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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 94.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, (LIMITED), PLAINTIFF IN ERROR,

vs.

ELLIS G. HUGHES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED OCTOBER 13, 1884.

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a DISTRICT OF OREGON, *ss:*

I certify that on the 25th day of August, 1884, at Portland, Multnomah county, in said district, I duly served the within citation on writ of error upon the therein-named Ellis G. Hughes by exhibiting said citation to him and by delivering to him personally a true copy of said citation, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal.

b UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

To Ellis G. Hughes, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in Washington on the second Monday in October, A. D. eighteen hundred and eighty-four, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein The Dundee Mortgage and Trust Investment Company, Lim., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this August 25, 1884.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

c [Endorsed:] No. —. U. S. circuit court, district of Oregon. Ellis G. Hughes *vs.* The Dundee Mortgage and Trust Investment Company, Limited. Citation on writ of error. Filed August 25, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

d *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, Plaintiff in Error,
vs.
ELLIS G. HUGHES, Defendant in Error. } No. —.

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before the Honorable Matthew P. Deady, one of you, between Ellis G. Hughes, plaintiff and defendant in error and The Dundee Mortgage and Trust Investment Company, Limited, defendant and plaintiff in

error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-four, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this August 25, 1884.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By G. G. GAMMANS,
Deputy Clerk.

e [Endorsed:] In the Supreme Court of the United States. The Dundee Mortgage and Trust Investment Company, Limited, plaintiff in error, *vs.* Ellis G. Hughes, defendant in error. Writ of error. Filed August 25, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

f In the Circuit Court of the United States for the District of Oregon. October Term, 1882.

Be it remembered that on the 12th day of February, 1883, there was duly filed in the circuit court of the United States for the district of Oregon a complaint in words and figures as follows, to wit:

1 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, Defendant.

The plaintiff complains of the defendant and for cause of action alleges—

That said plaintiff is a citizen of the United States, residing at Portland, in the State of Oregon, and the defendant is a foreign corporation, incorporated under the laws of Great Britain and Ireland,

with its registered office at Dundee, in Scotland, with an office and agency for the transaction of business at Portland, in the State of Oregon.

That on or about the 1st day of August, 1876, the Oregon and Washington Mortgage Savings Bank, Limited, of Dundee, in Scotland, incorporated under the laws aforesaid, appointed this plaintiff as its attorney, resident at the city of Portland, in said State of Oregon.

That the said Oregon and Washington Savings Bank, Limited, became and was indebted to this plaintiff in the sum of five thousand and five hundred dollars upon an account for services rendered by this plaintiff to said bank as its attorney, as
2 aforesaid, between the 1st day of July, 1876, and the 1st day of January, 1882, in counseling and advising said bank in and about its business in the State of Oregon and Washington Territory, and other acts and attendances in and about the business of said bank at its request, and for money laid out by this plaintiff for said bank, at its request, in and about said business; and that the services of this plaintiff for said bank, rendered as aforesaid at its request, were reasonably worth the sum of one thousand dollars per annum, or the sum of five thousand five hundred dollars in the aggregate.

Plaintiff further alleges that the Oregon and Washington Trust Investment Company, Limited, a foreign corporation created and duly incorporated under the laws aforesaid, duly appointed this plaintiff its attorney to attend as such to its business in the State of Oregon and Washington Territory, and that such appointment was made on or about the 1st day of January, 1876, the said corporation having been theretofore duly incorporated as aforesaid.

That, in pursuance of said appointment and at the request of said company, this plaintiff, as such attorney, rendered services to said company in counseling and advising it in and about its business in the State of Oregon and Washington Territory and other acts and attendances in and about the said business of said company
3 at its request, and pl'ff laid out and expended money for said company, at its request, in and about said business, all between the 1st day of January, 1876, and the first day of January, 1880, and that the said services of this plaintiff, including his expenditures, were reasonably worth the sum of $2,500.00 per year for each and every year during all of said period.

Plaintiff further alleges that in and about the month of January, 1880, the said Oregon and Washington Trust Investment Company, Limited, amalgamated with *with* the said defendant, The Dundee Mortgage and Trust Investment Company, Limited, and that the said former company became and was merged in the said latter company; that by virtue of said amalgamation the property, effects, and assets of the said former company were transferred to and became the property, effects, and assets of the said latter company; that by virtue of said amalgamation this defendant assumed, became liable for, and agreed to pay the liabilities of the Oregon and Washington Trust Investment Company, Limited, existing at the time of said

amalgamation; that at the time of said amalgamation the indebtedness of the said O. & W. T. I. Co., Limited, to this plaintiff for his services as its attorney as aforesaid was an existing liability, and that by virtue of said act of amalgamation this defendant became liable for and undertook and promised to pay this plaintiff what his said services as aforesaid were reasonably worth, and that said sum of
4 $2,500.00 per year for said services from the 1st day of January, 1876, to the first day of January, 1880, is now due and owing from said defendant to this plaintiff.

Pl'ff further alleges that after said act of amalgamation, at the request of this defendant, he rendered services and expended money as its attorney up to and until the 1st day of January, 1882; that as such attorney he advised and counseled this defendant and rendered other professional services in and about its business in the State of Oregon and Washington Territory between the date of said amalgamation and the 1st day of January, 1882, and that his said services as such attorney were reasonably worth the sum of $2,500.00 per year, including all expenses incurred by said plaintiff in the rendition of said services.

Plaintiff alleges that on or about the 30th day of June, 1882, the said Oregon and Washington Mortgage Savings Bank, Limited, amalgamated with and became and was merged in this defendant; that by virtue of said amalgamation all the assets of said bank became the property of this defendant, and this defendant, by said act of amalgamation, assumed and agreed to pay all existing liabilities of said bank; that the indebtedness of said bank to this plaintiff for services as aforesaid was at the time an existing liability, and this defendant, by virtue of said act of amalgamation, agreed to pay this plaintiff what his services to said bank as aforesaid
5 were reasonably worth.

Plaintiff further alleges that the defendant, the said Dundee Mortgage & Trust Investment Co., became and was indebted to this pl'ff in the sum of two hundred and twenty-four dollars and $\frac{80}{100}$ for professional services rendered by plaintiff to said company in a certain foreclosure suit by said company against Luther Elkins and others, and that said fees were due and owing to pl'ff seperate and apart from his other services as aforesaid.

Pl'ff further says that after said act of amalgamation the said D. M. & T. I. Co., Limited, was indebted to this plaintiff for professional services rendered by him to said company in the foreclosure case of William Reid, manager, against Joseph A. Hill *et al.* in the sum of $531.00, which said fee is seperate and apart from the other services rendered by plaintiff to said company as aforesaid; and said services in said suits were rendered at the request of said company.

Plaintiff further alleges that by virtue of said act of amalgamation the defendant became liable and undertook and promised to pay this pl'ff his said fees in the two suits aforesaid.

Plaintiff alleges that by virtue of the promise the said defendant became and is indebted to this plaintiff in the sum of $21,255.80, the whole amount of which is unpaid and is now due and owing from def't to plaintiff.

6 Wherefore pl'ff prays judgment for said sum of $21,255.80, with his costs and disbursements.

GEO. H. WILLIAMS,
C. B. BELLINGER,
Attorneys for Plaintiff.

STATE AND DISTRICT OF OREGON:

I, Ellis G. Hughes, being duly sworn, say that I am the plaintiff above named and that the foregoing complaint is true, as I verily believe.

ELLIS G. HUGHES.

Subscribed and sworn to before me this 12th day of February, 1883.

[NOTARIAL SEAL.] JNO. BEVERIDGE,
Notary Public for Oregon.

Original endorsed: Filed February 12, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

6a And afterwards, to wit, on the 12th day of February, 1883, there was issued out of said court a summons in words and figures as follows, to wit:

6b DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ I have served the same upon the therein-named The Dundee Mortgage and Trust Investment Company, Limited, the within-named defendant, by exhibiting same to W. H. Effinger, attorney for said defendant, and by delivering to said W. H. Effinger, attorney for said def't, personally, a true copy thereof, duly certified to by me as U. S. marshal of said district, together with a copy of the complaint in the within action, duly certified to by the clerk of the circuit court of said district, at Portland, Multnomah county, in said district, on the 12th day of February, A. D. 1883.

EDWARD S. KEARNEY,
U. S. Marshal,
By WARD S. STEVENS, *Deputy.*

7 *Summons.*

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED. } No. 881.

The President of the United States to The Dundee Mortgage and Trust Investment Company, Limited, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Portland, in said district, and answer the com-

plaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you if served within the county of Multnomah, in said district, or if served within any other county of said district, then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof the plaintiff will take judgment against you for twenty-one thousand two hundred and fifty-five & $\frac{80}{100}$ dollars, together with his costs and disbursements.

7*a* And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court affixed, at Portland, in said district, this 12th day of February, 1883.

[SEAL.] R. H. LAMSON, *Clerk*,
By G. G. GAMMANS,
Deputy Clerk.

Original endorsed: No. 881. In the circuit court of the United States for the district of Oregon. Ellis G. Hughes *vs.* The Dundee Mortgage and Trust Investment Company, Limited. Summons. Returned and filed February 13, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

7*b* And afterwards, to wit, on the 13th day of February, 1883, there was duly filed in said court a demurrer to the complaint in words and figures as follows, to wit:

8 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY, LI'T., Defendant.

Now comes the def't corporation, by Effinger & Bourne, its attorneys, and demurs to the complaint in the above-entitled action, and for cause of demurrer says the complaint does not state facts sufficient to constitute a cause of action.

EFFINGER & BOURNE,
Att'ys for Defendant.

Original endorsed: Filed February 13, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

8a And afterwards, to wit, on the 13th day of February, 1883, there was duly filed in said court a demand for items of account in words and figures as follows, to wit:

9 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY, LIMITED, Defendant.

To Ellis G. Hughes, pl'ff, and George H. Williams and C. B. Bellinger, Esqrs, his attorneys.

GENTLEMEN: Referring to your complaint in the above-entitled action and court, and to section 82, title XI, chap. I, Code of Oregon, I, as attorney for the defendant corporation, hereby demand of you an itemized account of each of the several causes of action pleaded by you in your said complaint—that is to say, such an account of the cause first pleaded, upon which you claim $5,500.00, such an account to show whether the "counselling and advising" was general or special and, if the latter, the times, things advised about, prices thereof, and particularly what such services was, what constituted the "other acts and attendance" in and about the business of said bank; also particularly items of moneys laid out by pl'ff for said bank, giving amounts and dates.

Also such an account of the said second cause of action, for which you claim $2,500 per year for four years, such account to show particulars as last aforesaid.

10 Also such an account of the said third cause of action, for which you claim $2,500 per year for two years, such account to show particulars as first and second aforesaid.

Also such itemized account to show the agreement, if any, as to the two claims, in amount $224.80 and $531.00, for alleged foreclosure services; also each to show the amount of the claims so alleged to have been foreclosed, whether the said suits are ended, and particularly the items of service.

You will please take notice that on this 13th Feb., '83, I thus make written demand for the items and particulars afore suggested, and that unless they are furnished me within five days next following I shall, upon the trial hereof, move the court to exclude all evidence thereof.

W. H. EFFINGER,
Att'y for the Dundee Mortgage and Trust Investment Co., L'd.

Original endorsed: Filed February 13, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

10a And afterwards, to wit, on the 16th day of February, 1883, there was duly filed in said court an itemized bill or statement of plaintiff's claim in words and figures as follows, to wit:

11 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES

vs.

THE DUNDEE MORTGAGE TRUST INVESTMENT CO., LIMITED.

I, Ellis G. Hughes, the above-named pl'ff, hereby answering the demand of the said def't for an itemized account of the several causes of action in the complaint contained, say and state that as to my services for the Oregon and Washington Savings Bank, Limited, and as to the money laid out and expended by me in connection with said services, and for which I claim $5,500, I cannot render an itemized account thereof. I state that William Reid was the manager of said bank in the city of Portland during all the time for which I have claimed compensation as the attorney for said bank; that during all that time I was his sole legal adviser in the transaction of his business as the manager of said bank; that I was consulted by him as to all the questions that arose in the transaction of said business and upon which he needed or required legal advise, and that I advised him as to such matters. I cannot now state particularly the questions upon which he obtained my advice,

12 but he consulted me as to the contracts which he made, the changing and modification of contracts upon the subject of taxes, the nature and character of instruments of writing, and the multitudinous matters that arose in the transaction of the business of said bank. His consultations with me were very frequent, almost of daily occurrence, and occupied my time, varying from half an hour to half a day, almost daily. I cannot state particularly as to the amount of money expended by me for and on account of said bank. I had clerks employed in my office, and frequently portions of the time of my clerks were taken in doing work for said bank.

I attended sessions of the Legislature in the interest of said bank and paid my own expenses. I did not keep nor have I any items of my services or expenses on account of said bank, because I expected that my compensation for said services and expenses would be in the nature of a salary to be paid to me, and as Mr. Reid was entirely conversant with the extent and nature of my services and expenses for said bank I presumed that without much difficulty we could agree upon the amount of my compensation. I do not claim anything under any special appointment for any special business. I was employed, recognized, and treated as the general attorney of said bank, and my services were of the general nature above specified.

I further state as to my claim of $2,500 for four years'

13 services for the Oregon and Washington Trust Investment Company, Limited, and for money expended therefor, that

my appointment as attorney for said company, as indicated in the complaint, was in writing and was general, and I was not appointed to do any special business, but to do generally whatever an attorney and counselor at law might be required to do in the transaction of the business.

Mr. William Reid was also the sole manager of said company, with his office in the city of Portland, and I was his sole legal adviser.

As to the nature, character, and extent of my services and expenditures of money by me for said company, I hereby repeat and renew what I have said as to the Oregon and Washington Mortgage Savings Bank, Limited, in all its particulars and details, and I cannot make any more itemized account of this claim than I could of the claim accruing against said bank and for the same reasons as hereinbefore mentioned. All that I have said as to my claim for services and money expended to and for the said savings bank is true of my claim for services and money expended to and for the said mortgage and trust investment company.

As to my third claim for $2,500.00 maintained in the complaint, I state that after the amalgamation of the said Oregon & Washington Trust and Investment Company, Limited, with this
14 defendant, Mr. William Reid, continuing to be the sole manager of the defendant in the city of Portland, I continued to be the sole legal adviser in and about the business of said company; and the statement which I have hereinbefore made as to my services for the Oregon & Washington Mortgage Savings Bank, Limited, is applicable in all its details and particulars to my services for this defendant; and what I have said of my services for said bank is true in all respects of my services for this defendant as stated in the complaint.

Respecting my two claims, one for $224.80 and the other $531.00, I state that each of the defendants in the foreclosure suits named in the complaint executed to the Oregon & Washington Trust Investment Company, Limited, or to Mr. Wm. Reid, as manager, mortgages wherein the mortgagors agreed, in case of the foreclosure of said mortgages, that they would respectively pay, as attorneys' fees in the case, the amounts specified in the complaint; that the property described in said mortgages was sold upon decrees of foreclosure, which I obtained as the attorney of said company; and the property in each case was purchased by or for said company and bid off at the full amount of each of said decrees, including the said fees to be paid to the attorney for foreclosing said mortgages, and the said foreclosure suits are ended.

15 GEO. H. WILLIAMS,
C. B. BELLINGER,
Att'ys for Pl'ff.

STATE OF OREGON, } ss:
Multnomah County, }

I, Ellis G. Hughes, being duly sworn, on oath do say that the foregoing answer is true.

ELLIS G. HUGHES.

Subscribed & sworn to before me this sixteenth day of February, A. D. 1883.

[NOTARIAL SEAL.] JNO. BEVERIDGE,
Notary Public for Oregon.

Original endorsed: Filed February 16, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

15*a* And afterwards, to wit, on the 1st day of March, 1883, there was duly filed in said court a notice of motion to strike demurrer from files and for judgment in words and figures as follows, to wit:

16 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Pl'ff,
vs.
THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY, LIMITED, Def't.

Please take notice that on Monday, the 5th proximo, at 10 o'clock a. m. of said day, I shall move said court to strike the def't's demurrer herein from the files, because it is not filed & served according to the rules of said court. I shall also then & there move said court for judgment for pl'ff for want of an answer.

Feb'y 28, 1883.

GEO. H. WILLIAMS,
Atty for Pl'ff.

To W. H. Effinger, Esq., att'y for defendant.

Original endorsed: Filed March 1, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

16*a* DISTRICT OF OREGON:

Due service by copy of the within motion is admitted this 28th day of Feb'y, 1883.

W. H. EFFINGER,
Att'y for Def't.

16*b* And afterwards, to wit, on the 1st day of March, 1883, there was duly filed in said court an affidavit & motion for enlargement of time for answer in words and figures as follows, to wit:

17 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Pl'ff,
vs.
THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY, LIMITED, Def't.

Now comes the def't, and upon the subjoined affidavit of W. H. Effinger moves the court to allow fifty days from the 5th of March,

1883, in which to file its answer herein, and that the time for answering be enlarged and extended for fifty days from this 5th of March, '83.

W. H. EFFINGER,
Att'y for Def't.

To Mr. Geo. H. Williams.

SIR: Will you please take notice that on Monday, the 5th proximo, when you call up your motion to strike out demurrer and for judgment, I will ask the court to read and consider this motion and the affidavit on which it is based.

W. H. EFFINGER,
Att'y for Def't.

18 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, Defendant.

I, W. H. Effinger, being first duly sworn, do say: I am the att'y for the def't in the above-entitled action, and that I am the statutory attorney for service of process as well; that on the 12th of Feb'y last I was served with a copy of the summons and complaint herein; that from the middle of October last past Mr. Edmund Robertson, barrister, of London, England, was here in Oregon, with a plenary power of attorney from the above-named defendant for the transaction of all its business, and that he remained here until the 23d of February, 1883, at which time he took his departure; that said Robertson while here removed from their respective positions as manager and attorney of this def't one Wm. Reid, Esq., and the plaintiff herein, who had, during all the period embraced in and referred to in the litigation herein, held such and aforesaid positions, and substituted for them one Hugh Roger as manager and this affiant as attorney, and that neither said Roger nor this
19 affiant is conversant with the details of any business done by said def't previous to their respective appointments; that the principal place of business of defendant is at Dundee, Scotland, where the records, papers, and general accounts of said defendant are kept; that upon the said 12th of February I presented said summons and complaint to said Edmund Robertson for instructions as to answering, and on said day or the next I demanded in writing from pl'ff an itemized statement of his account; that on the 16th he furnished me what was designed to be a response to such demand; that when I asked said Robertson for instructions as to answering I was informed by him that the matters and things in this action had been, as he supposed and believed, all fully settled between pl'ff and def't some time since, and that he, Robertson, was without any papers, evidences, or instructions touching any of the things so in controversy here, and that all the said papers were in Dundee; that since then and on the 1st day of March, 1883, I called upon Mr.

Wm. Reid aforesaid, and after informing him of the character of the claims now here in suit—saving the two minor causes of action arising from alleged foreclosure suits—I asked where the papers relating to such claims were, and that I was then informed by him that all such papers were, as he believed, in Dundee.

20 I say that I believe the matters and things hereinbefore alleged upon the information of said Robertson and said Reid as to the present whereabouts of said papers, memoranda, &c., are true.

I say that upon the 12 of February I had a copy of said complaint to be made and delivered it to said Robertson and requested him to forward the same by post at once to Dundee and have the papers sent to me, and that I was informed by him that he did so post the copy, together with the request for the papers, by steamer leaving this port on the 13th of February last.

I say that I believe the defendant has a good, sufficient, and valid defense to each and all and every cause of action in this action, but that I am unable to answer the complaint satisfactorily or intelligently or with regard to the rights of the def't in the absence of the documentary proofs at Dundee, which said proofs, as I am informed and believe, will show the terms upon which pl'ff rendered his alleged services, and the fact that they have all—saving possibly the two minor causes alleged to arise of foreclosure suits—been paid for.

I say, further, that the time of communication by post between Portland and Dundee one way runs from twenty-two to twenty-eight days, and that I have used all proper diligence in getting ready to make answer.

21 I say, further, that there is no person or paper or book or record here in Oregon from whom or from which I can obtain the information necessary for making my said answer, and that I have not been able to procure such information at any time since the said service on me of the summons and complaint.

I say, further, that on the day I filed the demurrer in this action I did so merely for the purpose of stilling or holding the matter till I could see and arrange with counsel for pl'ff for time to answer, but that in the hurry of business I accidentally omitted to call the attention of the attorneys for the pl'ff to the matter; that at the time of filing the same I did not think of the rule as to a copy for the double reason that, as before stated, I intended to speak to pl'ff's att'y and, additionally, I did not intend to rely upon said demurrer and supposed I would not have difficulty in having the time for answer enlarged.

As before stated, I forgot and omitted to speak to pl'ff's attorney, and now here make this affidavit for the purpose of asking of the court for an enlargement of the time for answer and for leave to answer.

W. H. EFFINGER.

Subscribed & sworn to before me this 1st day of March, A. D. 1883.

[NOTARIAL SEAL.] JONATHAN BOURNE, JR.,
Notary Public for Oregon.

Original endorsed: Filed March 1, 1883. R. H. Lamson, clerk.

21*a* And afterwards, to wit, on Monday, the 5th day of March, 1883, the same being the 81st judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

22 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY. } No. 881.

MARCH 5, 1883.

Now, at this day comes the plaintiff in the above-entitled cause, by Mr. George H. Williams, of counsel, and the defendant, by Mr. W. H. Effinger, of counsel, and this cause comes on to be heard upon plaintiff's motion to strike the demurrer to the complaint from the files and for judgment, and the court having heard the argument of counsel, it is ordered that the motion to strike out be, and the same hereby is, allowed; and, upon defendant's motion for time to answer, it is ordered that said defendant have until the fifteenth day of April next to file his answer herein; and it is further ordered that said defendant pay the costs of plaintiff's motion, taxed at —.

22*a* And afterwards, to wit, on the — day of April, 1883, there was duly filed in said court stipulation enlarging time to file answer in words and figures as follows, to wit:

23 In the United States Circuit Court for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT CO., LIMITED, Defendant.

It is hereby stipulated and agreed that the order heretofore awarded by the Hon. Matthew P. Deady enlarging the time for filing the def't's answer may be still further enlarged, and def't may take till Friday, the 20th of April, in which to file his said answer.

GEO. H. WILLIAMS,
Att'y for Plaintiff.
W. H. EFFINGER,
Of Att'ys for Defendant.

Original endorsed: Filed April —, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

23a And afterwards, to wit, on the 20th day of April, 1883, there was duly filed in said court an answer in words and figures as follows, to wit:

24 *Answer.*

In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

—

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, Defendant.

Now comes the defendant corporation, the Dundee Mortgage and Trust Investment Co., L'd, by its attorneys, Effinger and Bourne, and for answer to the complaint filed herein against it by pl'ff Hughes it says: Answering the 1st cause of action pleaded, it admits that at the time set out the pl'ff became, by appointment, the attorney of the Oregon and Washington Mortgage Savings Bank, Limited, but alleges that it will hereafter set out the terms and conditions of such and said appointment; it denies that the Oregon and Washington Savings Bank, Limited, became or was, or that it ever became or ever was, indebted to plaintiff in the sum of $5,500.00, or any other sum of money whatever, upon any account for services rendered by plaintiff to said bank as its attorney or otherwise between the 1st of July, 1876, and the 1st of January, 1882, or for any period of time whatever, either in counselling or advising said bank in or about its business in either the State of Oregon or the Territory of Washington, or for said or any services so
25 rendered or any or other acts or attendance in or about the said or any business of said bank, at its request or otherwise, or for any money laid out by plaintiff for said bank, at its request, in or about said or any business of said bank; denies that the said or any services of this plaintiff for or to said bank rendered as aforesaid, at its request or at all, were or are reasonably or at all worth the sum of $1,000.00 per annum or any sum per annum or the sum of $5,500.00 in the aggregate or any sum of money whatever, either in the aggregate or as per annum.

Further answering this 1st cause of action, defendant denies that this plaintiff ever, at any time or on any account, rendered to the said Oregon and Washington Mortgage Savings Bank, Limited, or to its use, any service of any kind whatever, or that he ever paid or laid out or expended any money to its use or at its request, or that he ever at any time rendered to it any service at its request save as shall hereinafter be specifically alleged, shown, and pleaded; and denies that the said bank or that this defendant does now or that it ever did owe to him, this pl'ff, on account of said or any service, $5,500.00, or any other sum of money whatever.

Defendant, further answering and now answering plaintiff's 2d cause of action as the same is pleaded, admits that the Oregon and Washington Trust Investment Company, Limited, appointed the plaintiff as its attorney, but says that it will hereinafter set out the

terms and conditions of such appointment; it denies that
26 in pursuance of such appointment or at all or that at the request of said last-named company or at all the plaintiff, as such attorney or otherwise, rendered any services to said company in counselling or advising it in or about its business in the State of Oregon or Washington Territory, or that he rendered other or any acts or attendance to said company in and about its said or any business at its request or otherwise, or that he paid or laid out or expended for said company or to its use or at its request in or about its said or any business, between the 1st day of January, 1876, and the first day of January, 1880, or between any dates or for any time, e-ther $2,500 or any other sum of money whatever per year or for each or any year between the 1st of Jan., 1876, and the 1st Jan., 1880, or for any period of time whatever; denies that such and said or any services so as alleged or at all rendered by plaintiff to said last-named company in any way or to any use, including or excluding expenditures by plaintiff for said company during the period of time last afore herein designated or for any other time, were or are reasonably or otherwise or at all worth the sum of $2,500.00 per year for each or every year aforesaid or for any year thereof or any portion of such time, or that they were worth any sum of money whatever over and above what has already by this plaintiff been received therefor, as this defendant will hereinafter allege and plead.

27 Further answering this 2d cause of action, defendant denies *that* the amalgamation between this defendant and the Oregon and Washington Trust and Investment Co., L'd, or *at* that at any time there was any indebtedness from the last-named Co. to this plaintiff; denies that the said alleged indebtedness of the said O. and W. T. I Co., L'd, as and for any services by plaintiff, as att'y for it, at the time of such amalgamation or merger, or that ever at any time, was an existing liability of the said O. and W. T. I. Co., L'd, and denies that it ever was or came to be in any way or on any account a debt, liability, or obligation in whole or in part of the said O. and W. T. I. Co., L'd; denies that by the said act of amalgamation or at all this defendant ever became liable for or that it ever undertook or promised to pay plaintiff the reasonable or any other value of his aforesaid or any services, or that this def't ever in any way or at any time promised, agreed, or undertook to pay pl'ff for such or said or any services what they were or might be reasonably worth or anything whatever.

Denies that the said or any sum of $2,500.00 per year or any sum of money whatever per year for said services or for any services or on any account, from the 1st day of January, 1876, to the 1st day of January, 1880, or for any other period of time whatever, is now due or owing from this def't to pl'ff; denies that said sum of money or any part of it ever became due or owing or that it is now so due or owing from this defendant to this plaintiff, either for or on
28 account of the matters and things pleaded in this 2d cause of action or for or on — account whatever.

Further answering this cause of action, defendant denies that ever

at any time there was any service whatever as attorney or otherwise rendered by this plaintiff to the Oregon and Washington Trust Investment Co., L'd, save as shall be hereinafter pleaded and shown, and that for all and such services this plaintiff has been fully paid.

Further answering and now answering the 3rd cause of action as the same is pleaded, defendant denies that after said act of amalgamation or at any time, at the request of defendant or otherwise, the plaintiff rendered services or any service or expended any money as its attorney or otherwise up to or until the 1st day of January, 1882, or that he rendered such or said or any services to it or for its use or any such service.

Denies that as such attorney or otherwise he advised or counselled this def't or that he rendered to it as such attorney or otherwise other or any professional services in or about its business in the State of Oregon or in Washington Territory between the date of said amalgamation and the 1st of January, 1882, or at any time; denies that he rendered to it or for its use any professional services at all, save as shall be hereinafter separately and specially shown and stated.

29 Denies that his said or any services or service as such attorney or otherwise were or are reasonably or otherwise worth the sum of $2,500.00 or any other sum of money whatever per year or for any time, including or excluding all or any expenses incurred by plaintiff in the rendition of such or said service or otherwise.

Denies that any services or service rendered by plaintiff to defendant or to its use was or is worth any money whatever in excess of the compensation had and received therefor by plaintiff, as shall presently and hereinafter be made to appear.

Denies that at the time of the amalgamation between this defendant and the Oregon and Washington Mortgage Savings Bank, Limited, or at any time, said alleged indebtedness or any indebtedness of said bank to this plaintiff for services as aforesaid or on any account was an existing or any liability either upon said bank or upon this defendant, and denies that there ever was such or any indebtedness due from or owing by said bank or by this defendant, and denies that it, by virtue of said or any act of amalgamation or otherwise, agreed or promised to pay this plaintiff what his services to or for said bank were reasonably worth or any sum of money whatever on any account or at all, and denies that it ever or in any way promised or agreed to pay him, either for itself or for said bank, any money whatever.

Further answering and now answering 4th cause of action as the same is pleaded, defendant denies that it ever became or was or that

30 it is now indebted to plaintiff in the sum of $224.80 or any other sum of money whatever for professional services or any service rendered by him to it in a certain foreclosure suit by it against Luther Elkins or others or any person; denies that said fees or any fees were or are due or owing by it to plaintiff, separate or apart from his other services, as aforesaid, or in any way whatever.

Denies that after said act of amalgamation or at any time this defendant was or that it now is indebted to plaintiff for professional services rendered by him to it in the foreclosure suit or case of Wm. Reid, manager, against Joseph A. Hill *et al.*, or others, or otherwise, in the sum of $531.00 or in any other sum of money whatever; and, further answering as to the two said causes of action now here referred to, defendant says that in both of said suits there were foreclosures, and the proceedings were conducted by plaintiff as attorney; but that the agreement and understanding upon which he so undertook and did the said work was that when the property subjected by the decrees to sale should be sold the proceeds of sale should be applied, first, to court costs and fees, and then to the satisfaction of the debts due to defendant; the fees to plaintiff to be paid from excess, if any, the said fees being provided for in the two said mortgages which were so foreclosed. The foreclosures were completed, but the defendant was forced to buy in the property in each case, and did so buy in for the costs of court and the debts due to it, and for no more;

31 that the understanding further was that the fees of plaintiff allowed by the court were, in the event of defendant's buying the property only, to be paid to him whenever thereafter the property should be sold for a sufficient sum to pay the debt or debts of defendant and said fees, and not before or otherwise; that defendant still owns and holds the property so bought by it in the two said foreclosure proceedings in its name, but only as security for the two said debts, and that plaintiff is not entitled to any fees or compensation for his said services until the property may or can be sold for enough to pay, first, the entire debt of defendant in each case, and then the said fees so allowed by the court to plaintiff; that the lands cannot now be sold for a sufficient sum to pay said amounts, nor can either of said parcels of realty be now sold for an amount sufficient to pay the debt to def't and said fee to plaintiff, and that there is nothing due on either of said foreclosure suits from this defendant to plaintiff; that in both and in each he exempted and discharged defendant from all liability for said foreclosure fees, and agreed to look alone to the real property conveyed in security by the two said mortgages and to the covenants contained in said mortgages, charging said property with the payment of attorneys' fees in the event of foreclosure.

Defendant denies that by virtue of the premises or at all it ever became indebted or ever was indebted or is now indebted to

32 plaintiff in the sum of $21,255.80, or in any sum of money whatever; denies that the whole of said sum or any part or portion thereof is now unpaid or due or owing from it to the plaintiff, or that any portion thereof ever was due or owing from or by defendant to plaintiff on the said or any other account whatever.

Further answering plaintiff's complaint, defendant denies that on the ninth of January, 1880, the Oregon and Washington Trust Investment Co., L'd, amalgamated with this defendant, and denies that such amalgamation took effect on any other date than on the 31st of January, 1880; denies that on the 30th day of June, 1882, the Oregon and Washington Mortgage Savings Bank, Limited,

amalgamated with this defendant, and denies that such amalgamation took effect on any other date than on the 1st of August, 1882.

Further answering, defendant says that itself and all the other corporations mentioned were stock corporations organized out of this country, but doing business in this State and in Washington Territory; that the only business done by them was the business of placing money loans upon real estate securities and no other; that to secure said loans the companies took from the borrowers mortgages upon real property and did not otherwise make or place loans.

Plaintiff Hughes did act as attorney for said Oregon and Washington Trust Investment Co., L'd, and for said Oregon & Washington Savings Bank, Limited, during the times, respectively, they had separate existence and before amalgamation with this de-
33 fendant, and did render to them legal advice and counsel in and about their business aforesaid, but defendant alleges and says that the agreement and understanding between plaintiff and each of the two said corporations during the whole time he so rendered such service was that he was not to have or make any charges whatever against the said corporations, but that he was to be remunerated entirely by fees charged by him to the borrowers; that said corporations made large loans, and that the fees so charged to borrowers by plaintiff were of considerable amount, and that they were accepted and taken by plaintiff as full compensation for all the service or services he rendered to the two said corporations.

That they, for their security in placing loans, appointed said plaintiff as their attorney or legal adviser, and that by reason of such appointment all persons who desired loans were referred to plaintiff for search of title and preparation of mortgage by def't, but upon the agreement aforesaid only, all borrowers being so directed by the two said corporations and being notified that the costs of such search of title and preparation of mortgage were by them to be paid to said plaintiff; that the two said corporations carried on a large and active business in the way of placing loans as aforesaid, and did so continuously until they were amalgamated with this defendant; that it took and continued said business and retained plaintiff as its attorney, receiving from him legal and professional assistance, but upon the agreement only that his remunera-
34 tion was to be had and taken by fees charged to borrowers, and that it never did in any way promise, agree, or undertake to pay him any compensation therefor, save as he took the same under the terms of the original and first agreement, which was a subsisting and continuing one during his entire service between him and the three said corporations.

Further answering, defendant says plaintiff was, during all the times mentioned in the complaint, a shareholder in the Oregon and Washington Mortgage Savings Bank, L'd, in the Oregon and Washington Trust Investment Co., L'd, and in this defendant; that he received copies of the yearly reports and balance sheets of each of said companies; that their balance sheets and reports did not show at any time any debit in favor of plaintiff for or on account of the charges now here by him made, nor for any of them, and that

such balance sheets and reports were the basis upon which dividends to stock were shown and declared; that dividends were so declared and shown, and the same were, as they became thus stated and shown, accepted and taken by this plaintiff as such shareholder in each and all of the said companies, and that he did so receive and take the said dividends so declared in each of the said companies, as well as such balance sheet and reports.

Further answering, defendant says plaintiff has been fully paid and compensated for all and every service he has rendered
35 to it and to the two other aforenamed companies; and, having fully answered, it prays to be hence dismissed with its costs and disbursements expended and to be expended.

EFFINGER AND BOURNE,
Atty's for Defendant Corporation.

UNITED STATES OF AMERICA, *District of Oregon:*

I, Hugh Roger, being first duly sworn, do say: I am the agent of the foregoing defendant; that it is a foreign corporation and not now within this jurisdiction; that I have read the foregoing answer, and that it is true, as I verily believe.

HUGH ROGER,
Agent for the Dundee Mortgage & Trust Investment Co., L'd.

Subscribed & sworn to before me this 20th day of April, A. D. 1883.

[NOTARIAL SEAL.] JONATHAN BOURNE, JR.,
Notary Public for & in Oregon.

Original endorsed: Filed April 20, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

35*a* And afterwards, to wit, on the 26th day of April, 1883, there was duly filed in said court a motion to strike out part of answer in words and figures as follows, to wit:

36 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY, LIMITED, Def't.

Now comes the said plaintiff and moves to strike out of defendant's answer that portion thereof commencing with the words, "Further answering, defendant says plaintiff was, during all the time mentioned in the complaint, a shareholder," &c., &c., and concluding with the words, "He did so receive and take the said dividends so declared in each of the said companies, as well as such balance sheet and reports," for the reason—1st, that the same is—

sham and irrevelant; 2d, it is pleading what can be nothing more than evidence in the case; 3rd, it is no defense to the suit.

WILLIAMS & BELLINGER,
Att'ys for Pl'ff.

Original endorsed: Filed Apr'l 26, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

36*a* And afterwards, to wit, on Monday, the 21st day of May, 1883, the same being the 27th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

37 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY. } No. 881.

MAY 21, 1883.

Now, at this day comes, the plaintiff in the above-entitled cause, by Mr. George H. Williams, of counsel, and the defendant, by Mr. William H. Effinger, of counsel, and this cause comes on to be heard upon plaintiff's motion to strike out part of defendant's answer, and plaintiff's further motion for leave to file an amended complaint, and the court, having heard the arguments of counsel, will advise thereof.

37*a* And afterwards, to wit, on the 21st day of May, 1883, there was duly filed in said court a notice of motion for leave to file amended complaint in words and figures as follows, to wit:

38 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,
vs.
THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY, Defendant.

Please take notice that on next Monday, the 14th inst., or as soon thereafter as counsel can be heard, I shall move said court for leave to file an amended complaint in the above-entitled cause, a copy of which is herewith served, & at the same time shall call up the motion to strike out from the answer certain matter, according to the notice heretofore served.

May 9th, 1883.

GEO. H. WILLIAMS,
Att'y for Pl'ff.

To Effinger & Bourne, att'ys for def't.

Copy of the above received May 9, 1883.

W. H. EFFINGER,
Att'y for Def't.

Original endorsed: Filed May 21, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

38a And afterwards, to wit, on the 23d day of May, 1883, there was duly filed in said court an amended complaint in words and figures as follows, to wit:

39 *Amended Complaint.*

In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY, LIMITED, Defendant.

The plaintiff complains of the defendant, & for cause of action alleges:—

That said plaintiff is a citizen of the United States, residing at Portland, in the State of Oregon, & the defendant is a foreign corporation incorporated under the laws of Great Britain and Ireland, with its registered office at Dundee, in Scotland, with an office & agency for the transaction of business at Portland, in the State of Oregon.

That on or about the 1st day of August, 1876, the Oregon & Washington Mortgage Savings Bank, Limited, of Dundee, in Scotland, incorporated under the laws aforesaid, appointed this plaintiff as its attorney, resident at the city of Portland, in said State of Oregon.

That said Oregon & Washington Savings Bank, Limited, became & was indebted to the plaintiff in the sum of five thousand dollars upon an account for services rendered by the plaintiff to said bank as its attorney as aforesaid between the 1st day of July, 1876, & the 17th day of July, 1881, in counselling & advising said

40 bank in & about its business in the State of Oregon & Washington Territory & other acts and attendances in & about the business of said bank at its request & for money laid out by the plaintiff for said bank at its request in and about said business, & that the services of this plaintiff for said bank rendered as aforesaid at its request were reasonably worth the sum of one thousand dollars per annum or the sum of five thousand dollars in the aggregate.

Plaintiff further alleges that the Oregon & Washington Trust Investment Company, Limited, a foreign corporation created & duly incorporated under the laws aforesaid, duly ap-ointed this plaintiff its attorney to attend as such to its business in the State of Oregon & Washington Territory, & that such appointment was made on or about the 1st day of January, 1876, the said corporation having been theretofore duly incorporated as aforesaid.

That in pursuance of said appointment & at the request of said company this plaintiff, as such attorney, rendered services to said company in counselling & advising it in & about its business in the State of Oregon & Washington Territory & other acts & attendances in & about the said business of said company at its request, & plaintiff laid out & expended money for said company at its request in & about said business, all between the 1st day of January, 1876, & the 1st day of January, 1880, & that the said services of this plaintiff, including his expenditures,
41 were reasonably worth the sum of $2,500 per year for each & every year during all of said period.

Plaintiff further alleges that in & about the month of January, 1880, the said Oregon & Washington Trust Investment Company, Limited, amalgamated with the said defendant, The Dundee Mortgage & Trust Investment Company, Limited, & that the said former company became & was merged in the said latter company; that by virtue of said amalgamation the property, effects, & assets of the said former company were transferred to and became the property, effects, & assets of the said latter company; that by virtue of said amalgamation the defendant aforesaid became liable for & agreed to pay the liabilities of the Oregon & Washington Trust Investment Company, Limited, existing at the time of the amalgamation; that at the time of said amalgamation the indebtedness of the said Oregon & Washington Trust Investment Company, Limited, to the plaintiff for his services as its attorney as aforesaid was an existing liability, & that by virtue of said amalgamation this defendant became liable for & undertook & promised to pay this plaintiff what his said services as aforesaid were reasonably worth, & that the said sum of $2,500 per year for said services from the 1st day of January, 1876, to the 1st day of January, 1880, is now due & owing from said defendant to this plaintiff.

42 Plaintiff further alleges that from & after said act of amalgamation, at the request of this defendant, he rendered services & expended money as its attorney up to & until the 1st day of January, 1882; that as such attorney he advised & counselled this defendant & rendered other official services in & about its business in the State of Oregon & Washington Territory between the date of said amalgamation & the 1st day of January, 1882, & that his said services as such attorney were reasonably worth the sum of $2,500 per year, including all expense incurred by said plaintiff in the rendition of said services, but plaintiff makes no claim to compensation for said services after the 17th of July, 1881.

Plaintiff alleges that on or about the 30th day of June, 1882, the said Oregon & Washington Mortgage Savings Bank, Limited, amalgamated with & became & was merged in this defendant; that by virtue of said amalgamation all the assets of said bank became the property of the defendant, & this defendant, by said act of amalgamation aforesaid, agreed to pay all existing liablities of the said bank; that the indebtedness of said bank to this plaintiff for services as aforesaid was at the time an existing liability, & this defendant, by virtue of said act of amalgamation, agreed to pay the

plaintiff what his services to said bank as aforesaid *was* reasonably worth.

Plaintiff further alleges that the defendant, the said Dundee
43 Mortgage & Trust Investment Company, became & was indebted to plaintiff in the sum of two hundred & twenty-four dollars & $\frac{80}{100}$ for professional services rendered by plaintiff to said company in a certain foreclosure suit by said company against Luther Elkins & others, & that said fees were due & owing to plaintiff separate & apart from his other services as aforesaid.

Plaintiff further alleges that after said act of amalgamation the said Dundee Mortgage & Trust Company, Limited, was indebted to the plaintiff for professional services rendered by him to said company in the foreclosure case of William Reid, manager, against Joseph W. Hill *et al.* in the sum of $531, which said fee is separate & apart from the other services rendered by said plaintiff to said company as aforesaid, and said services in said suits were rendered at the request of said company.

Plaintiff further alleges that by virtue of said act of amalgamation this defendant became liable & undertook & promised to pay this plaintiff the said fees in the two suits aforesaid.

Plaintiff alleges that by virtue of the premises the said defendant became & is indebted to plaintiff in the sum of $19,755.00, the whole amount of which is unpaid & is now due & owing from defendant to plaintiff.

Wherefore plaintiff prays judgment for said sum of $19,755.00 with his costs & disbursements.

GEO. H. WILLIAMS &
C. B. BELLINGER,
Attorneys for Plaintiff.

44 STATE OF OREGON, }
Multnomah County, } *ss:*

I, Ellis G. Hughes, being first duly sworn, say that I am the plaintiff above named, & that the foregoing amended complaint is true, as I verily believe.

ELLIS G. HUGHES.

Subscribed and sworn to before me this 9th day of May, A. D. 1883.

[NOTARIAL SEAL.] JNO. BEVERIDGE,
Notary Public for Oregon.

Service of a copy of the above-amended complaint acknowledged this 9th day of May, 1883.

W. H. EFFINGER.
Att'y for Defendant.

Original endorsed: Filed May 23, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

44a And afterwards, to wit, on Wednesday, the 23 day of May, 1883, the same being the 29 judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

45 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY. } No. 881.

MAY 23, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. George H. Williams, of counsel, and the defendant, by Mr. William H. Effinger, of counsel, and this cause having heretofore been heard upon plaintiff's motion to strike out part of the answer and plaintiff's motion for leave to file an amended complaint herein and now, at this day, the court being fully advised in the premises, it is ordered that said motions be, and they are hereby, allowed; and, upon motion of defendant, it is further ordered that it have five days to answer the amended complaint.

45a And afterwards, to wit, on the 1st day of June, 1883, there was duly filed in said court an answer to the amended complaint in words and figures as follows, to wit:

46 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT CO., L'D,
Defendant.

Now comes the defendant corporation, by its att'ys, Effinger and Bourne, and makes answer to the amended complaint filed against it by the plaintiff in the above-entitled action.

Def't admits that about the 1st of August, 1876, the Oregon and Washington Savings Bank, Limited, of Dundee, appointed plaintiff as its resident attorney, but upon terms and agreement as to compensation, hereinafter to be pleaded; denies that said last-named corporation ever became or ever was indebted to the plaintiff in the sum of $5,000.00 or in any other sum of money whatever upon any account for services rendered by plaintiff to said bank as its attorney or otherwise between the 1st of July, 1876, and the 17th of July, 1881, or for any other period of time whatever, or for any services at all at any time in counselling or advising said bank in or about its business in the State of Oregon or Territory of Washington, or for any other acts or attendances in or about the business of said bank at its request or otherwise, or for any money laid or paid out by plaintiff for said bank at its request or otherwise in or about said

47 business, and denies that said or any services of plaintiff for said bank rendered as alleged or at all, at its request or otherwise, were or are reasonably or at all worth the sum of $1,000.00 per annum or the sum of $5,000.00 in the aggregate or any sum of money whatever per annum or in the aggregate.

II. Further answering, def't admits that the Oregon and Washington Trust Investment Co., L'd, appointed plaintiff as its attorney about the 1st of January, 1876, but hereinafter will allege and plead the terms and conditions of such and said appointment as to compensation.

Denies that in pursuance of said appointment or that at the request of said company or that at all plaintiff, as such attorney or otherwise, rendered any services to said company in counselling or advising it in or about its business in Oregon or Washington Territory, or that he rendered other or any acts or attendances in or about the said business of said company at its request or otherwise; denies that he laid out or expended any money for said company at its request or otherwise in or about said business between the 1st of January, 1876, and the 1st of January, 1880, or at any time; denies that the said or any services of plaintiff, including or excluding his alleged expenditures, were or are reasonably or at all worth the sum of $2,500 per year for each or every year of said period, or any sum of money whatever per year or for any portion whatever of said or any period.

48 Denies that about the middle of January, 1880, this def't amalgamated with the Oregon & Washington Trust Investment Co., L'd, and says the true date of such amalgamation was the 31st of January, 1880; denies that at said date of amalgamation or that ever there was any indebtedness whatever from the Oregon & Washington Trust Investment Co., L'd, to plaintiff for services as attorney or otherwise; denies that at such time, to wit, when this def't amalgamated with the last-named company, there was any existing indebtedness of any amount due or owing from said company to plaintiff on any account whatever; denies that this alleged debt or any debt was at said time an existing liability or a liability at all, or that by virtue of said amalgamation or otherwise this defendant ever became liable for or ever undertook or promised to pay pl'ff what his said or any services were reasonably worth, or to pay him any sum of money whatever on said or any account; denies that the said or any services so or at all rendered were or are reasonably worth said or any sum of money whatever; denies that said sum of $2,500.00 per year for said services, or that any part of it, from the 1st of January, 1876, to the 1st of January, 1880, or for any other time, is now due or owing from defendant to plaintiff, or that it or any part of it ever has been due or owing from def't to pl'ff.

Further answering, defendant denies that from or after said amalgamation, at the request of defendant or otherwise, plaintiff rendered any services or expended any money as its attorney or otherwise till the 1st of January, 1882, or for any time, except as shall herein-

after be pleaded; denies that as such attorney or otherwise
49 he advised or counselled defendant or rendered other or any professional services in or about its business in Oregon or Washington Territory between the date of said amalgamation and the 1st of January, 1882, or for any time, except as shall hereinafter be pleaded; denies that his said or any services so or at all rendered were, as attorney or otherwise, reasonably or at all worth the sum of $2,500.00, or any other sum of money whatever per year, either including or excluding said alleged expenses incurred.

Further answering, defendant denies that on the 30th of June, 1882, the Oregon and Washington Savings Bank, Limited, amalgamated with this defendant, and alleges that the true date thereof was and is the 1st of August, 1882; denies that at the time of such amalgamation, or ever, the alleged or any indebtedness of said bank to plaintiff, for services as aforesaid or at all, was an existing liability, and denies that there ever was any such indebtedness or liability; denies that defendant, by virtue of said act of amalgamation or that in any way it agreed to pay plaintiff what his services to said bank as aforesaid were reasonably worth, or any sum of money whatever for this or on any other account.

Further answering, defendant denies that it became or was now or ever indebted to plaintiff in any amount whatever in consequence of said amalgamation or the agreements and undertakings it assumed thereby.

And now, further answering the causes of action just herein-
50 before pleaded to under the form of denial, defendant says: "the Oregon and Washington Savings Bank, Limited," and the "Oregon and Washington Trust Investment Co., L'd," were predecessors of itself, and, like it, were not banks, but "loaning corporations," placing foreign capital at loan upon interest on lands lying in the State of Oregon and Territory of Washington; that during all the times referred to in the complaint these corporations were under the management and control of one William Reid, as general manager, who had charge as such of these and of the business they transacted; that all and every of the claims and charges now in the complaint pleaded by plaintiff were founded upon and grew out of the loaning of money upon real estate; that during the times alleged plaintiff was by def't's designation the attorney of the said corporations in their order of being as aforesaid; that it was all the time distinctly understood and agreed by and between plaintiff and whichsoever corporation he was then so serving that he was not to charge and was not to receive any fees or compensation at all from said corporation or company, but that he was to look wholly to the borrowers for his compensation, and that for his fees to be thus taken he was to render without charge such general advice as might be desired by either of said corporations; that the fees thus taken were collected by plaintiff off of each and every loan so made by them or either of them, were large in amount in the aggregate, and were, as the work was delivered by plaintiff,
51 taken and accepted by him as payment in full for each and

every act of professional or other service now here in his complaint pleaded and shown and made the basis thereof, save and except that at different times and on account of the named corporations in the order and during the times they were so in business plaintiff occasionally paid out small portions of money to the use of either defendant or one or the other of the two precedent corporations; but to this defendant says plaintiff always therefor presented his bill, and the same was duly and on presentation paid to him.

III. Further answering the complaint, defendant denies that it ever became, was, or that it now is indebted to plaintiff in the sum of $224.80 or any other sum of money whatever, for professional or other services rendered by plaintiff to it in a certain foreclosure suit by it against Luther Elkins *et al.*, and denies that said fees or any part of them were or are due or owing to pl'ff separate or apart from his alleged other services as aforesaid; denies that after said act of amalgamation or at all or ever this defendant was or that it now is indebted to plaintiff for professional or other services rendered by him to it in the foreclosure case of William Reid, manager, against Joseph A. Hill *et al.* in the sum of $531.00 or in any other sum of money whatever; denies that said fee or any part of it is a debt due from def't either separate or apart from the other service so alleged to have been rendered by plaintiff to defendant or otherwise.

52 Denies that by virtue of said or any act of amalgamation or at all this def't became liable or ever undertook or promised to pay pl'ff his said or any fees in the two said suits.

And thereabout and further answering these two causes of action, defendant says plaintiff did foreclose in the two said suits, but upon this understanding only, that his fees therefor—the same now declared—were to be provided for in the mortgage, which was done, and the same were included in the decree; they, the fees, were to be paid out of proceeds of sale just as the debt secured by the mortgage, but in the event defendant was forced to buy in at the face of the whole debt or decreed amount, then plaintiff was to be deferred until a purchaser could be found for the premises; and it was further agreed that the debt due to def't upon its loan and interest was to be first paid, the overplus of amount realized to be applied to pl'ff's fees; that in both the suits referred to defendant was obliged to buy in and did buy in, for the face of the decree in each case, the lands subjected, and that it holds the same yet and is not able to sell the same; that the fees, therefore, of pl'ff have never been or become payable by def't.

IV. Further answering the complaint, defendant denies that by reason of the premises or in any way it has become or that it is indebted to plaintiff in the sum of $19,755.00, or in any other sum of money whatever; denies that the whole amount aforesaid or that any part thereof is unpaid or now due or owing from defendant to plaintiff.

53 And now defendant, having fully answered, prays to be

hence dismissed with its costs and disbursements hereinbefore and hereinafter expended and to be expended.

EFFINGER AND BOURNE,
Att'ys for Def't Corporation.

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, Hugh Roger, being first duly sworn, do say the def't corporation is now an absent, non-resident def't; that I am its general agent & manager; that I have read the foregoing answer, and that it is true, as I verily believe.

HUGH ROGER,
Agent for the Dundee Mortgage & Trust Investment Co., L'd.

Subscribed and sworn to before me this 30th day of May, A. D. 1883.

[NOTARIAL SEAL.] JONATHAN BOURNE, JR.,
Notary Public for & in Oregon.

Due service by copy had on us, at Portland, the 30th of May, 1883.

WILLIAMS & BELLINGER,
Att'ys for Plaintiff.

Original endorsed: Filed June 1, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

53*a* And afterwards, to wit, on the 5th day of June, 1883, there was duly filed in said court a replication to defendant's answer to amended complaint in words and figures as follows, to wit:

54 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY, LIMITED, Defendant.

The above-named plaintiff, for replication to defendant's answer to the amended complaint herein, says that it is not true, and he denies that all and every of the claims and charges pleaded by plaintiff in his said complaint were founded upon and grew out of the loaning of money upon real estate security; denies that it was distinctly or otherwise understood or agreed by and between plaintiff and said corporations or either of them, at any time or place, that he was not to charge or to receive any fees or compensation at all from said corporation or company, and denies that he was to look wholly or otherwise to the borrower or any borrowers for compensation for his services, as set out in said amended complaint, and denies that for the fees so taken he was to render, without charge, such general advice as might be desired by either of said companies, and

denies all or any arrangements, agreements, or understandings that he was to render or did render the professional services set
55 out in the amended complaint for any fees from borrowers or others, and denies that any such fees or any fees were taken or accepted by him as payment in full or otherwise for such and every or any of the acts of professional services pleaded in said complaint; and plaintiff denies that he has presented his bill and been paid the moneys he advanced and paid out for or on account of the said defendant and the two precedent companies or either of them, and denies that he has ever been paid in any way for the services and moneys set out in said amended complaint.

Plaintiff admits that, as to the fees in the two foreclosure suits set out in said complaint, there was an understanding or agreement that in case defendant was forced to buy at the price of the whole debt or decreed account this plaintiff was to be deferred until a purchaser could be found for the premises, and admits that it was agreed that the debt due upon the loan and interest was to be first paid, and that the overplus of the amount realized was to be applied to plaintiff's fees, but says that such understanding or agreement was entered into on the express terms and conditions that defendant should give to the plaintiff the foreclosure of all of its mortgages, and that the defendant has broken this agreement on its part and the same is now at an end and the plaintiff is entitled to his said fees. Plaintiff denies that there ever was any other agree-
56 ment or understanding upon that subject, and denies that defendant has not been and is not able to sell the property purchased in said foreclosure suits, and plaintiff denies that his fees in said foreclosure suits have not become and are not now due.

Wherefore plaintiff prays judgment as in his complaint.

GEO. H. WILLIAMS &
C. B. BELLINGER,
Attorneys for Plaintiff.

STATE OF OREGON, }
County of Multnomah, } *ss:*

I, Ellis G. Hughes, being first duly sworn, say that I am the plaintiff above named; that I have read the foregoing replication and know the contents thereof, and that the same is true, as I verily believe.

ELLIS G. HUGHES.

Subscribed and sworn to before me this 5th day of June, A. D. 1883.

[NOTARIAL SEAL.]

JNO. BEVERIDGE,
Notary Public for Oregon.

Original endorsed: Filed June 5, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

57 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT Co., Def't.

I hereby acknowledge the receipt of a copy of the replication filed in the above-entitled case.

JONATHAN BOURNE, JR.,
Of E. & B.

Endorsed: Receipt for copy of replication.

57*a* And afterwards, to wit, on Monday, the 22d day of October, 1883, the same being the 19th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

58 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIM. } No. 881.

OCTOBER 22, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. George H. Williams, of counsel, and the defendant, by Mr. William H. Effinger, of counsel, and by consent of parties it is ordered that this cause be, and the same is hereby, referred to Mr. Wm. B. Gilbert to take the testimony herein pursuant to a stipulation to be filed herein within three months from this date, to try said cause, and to report to this court his conclusions of fact and law therein; and said Wm. B. Gilbert is hereby appointed referee for the purpose aforesaid.

Endorsed: No. 881. U. S. circuit court, district of Oregon. Ellis G. Hughes *vs.* Dundee Mortgage & Trust Investment Co., Lim. Copy of order of reference

58*a* And afterwards, to wit, on the 5th day of December, 1883, there was duly filed in said court a stipulation in words and figures as follows, to wit:

59 In the U. S. Circuit Court for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT Co., L'D, Defendant.

It is hereby stipulated that —— Littlejohn may be called and examined as a witness upon the direct and cross-questions heretofore

with commission issued, upon notice and request of the defendant the commission having been previously hereto forwarded to Dundee; and, his name having been omitted, his testimony to be taken and, read as if his name had been in the list of witnesses furnished to plaintiff with the notice & interrogatories.

W. H. EFFINGER,
Att'y for Def't.
GEO. H. WILLIAMS,
Att'y for Plaintiff.

Original endorsed: Filed Dec. 5, 1883. R. H. Lamson, clerk.

59*a* And afterwards, to wit, on the 14th day of January, 1884, there was duly filed in said court a motion for leave to open depositions in words and figures as follows, to wit:

60 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,
vs.
THE DUNDEE MORTGAGE & TRUST INVESTMENT CO., LIMITED, Defendant.

Now comes the above-named plaintiff & moves the court for leave to open the depositions on file in the above-entitled case.

WILLIAMS & BELLINGER,
For Pl'ff.

Original endorsed: Filed Jan. 14, 1884. R. H. Lamson, clerk.

60*a* And afterwards, to wit, on the 18th day of January, 1884, there was duly filed in said court a motion to enlarge time for depositions & affidavit in words and figures as follows, to wit:

61 In the United States Circuit Court for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT CO., L'D, Defendant.

Now comes the defendant and upon the annexed affidavit moves the court to enlarge the time for taking testimony herein for sixty days from and after the 20th proximo.

EFFINGER & BOURNE,
Att'ys for Def't.

To Messrs. Williams, Hill, Durham, Thompson & Mays, the attorneys for plaintiff:

You will please take notice that on to-morrow at 10 a. m., or later if it shall suit the convenience of the court, the def't will submit the above motion and affidavit to the court for action thereon.

EFFINGER & BOURNE,
Att'ys for Def't.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Edmund Robertson, being first duly sworn, do say: I am the agent and attorney with plenary powers of the corporation
62 defendant herein; that among other duties I am charged with that of looking after the Co.'s defense herein; that the plaintiff took no testimony in this cause until the 16th of this month, and that, as I am informed and believe, the time fixed for taking said testimony will expire under the present order on the 20th proximo; that testimony is now being delivered therein, but that the defendant has not yet concluded its cross-examination of the first witness offered by the plaintiff. I say further that I am informed and believe that the Hon. Addison C. Gibbs, who was the attorney of the defendant's predecessor and assignor, first declared against in the amended complaint just prior to the appointment of plaintiff as such attorney, knows material and important facts relevant to defendant's defense herein; that the said Gibbs is now absent from this city and in the State of California, and that I am informed that he will probably remain so absent for four or five weeks next following; that I do not believe that I can prove the same facts by any other person.

EDMUND ROBERTSON.

Subscribed & sworn to before me this 17 day of January, 1884.
W. B. GILBERT,
Master in Chancery.

Original endorsed: Filed Jan. 18, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

63 Due service of within acknowledged by us as att'ys for pl'ff this 17th day of January, 1882.
H. Y. THOMPSON,
Of Att'ys for Pl'ff.

63*a* And afterwards, to wit, on Friday, the 18 day of January, 1884, the same being the 70 judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

64 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED. } No. 881.

JANUARY 18, 1884.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. H. Y. Thompson, of counsel, and the defendant, by Mr. Wm.

H. Effinger, of counsel, and, upon motion of defendant, it is ordered that the time to take testimony herein be, and the same is hereby, extended sixty days.

64*a* And afterwards, to wit, on the 5th day of May, 1884, there was duly filed in said court the report of the referee in words and figures as follows, to wit:

65 *Report of the Referee.*

In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, Defendant.

To the honorable judges of the above-entitled court:

The undersigned, the referee to whom by order of said court was referred the above-entitled cause to take testimony therein and report findings of fact and conclusions of law, would respectfully submit the following as such report:

That upon the 16th day of January, 1884, before me, the said referee, appeared the plaintiff in person and by Mr. H. Y. Thompson, his attorney, and the defendant, by Mr. W. H. Effinger, its attorney, and thereupon the testimony in said cause was taken before me, and the same is herewith filed.

That upon conclusion of said testimony the said cause was argued before me by the respective counsel of said parties.

That upon consideration of the pleadings and the testimony herein I make the following

66 *Findings of Fact.*

1. That the Oregon and Washington Trust Investment Company and the Oregon and Washington Mortgage Savings Bank were foreign corporations, having their home office at Dundee, in Scotland, and were engaged chiefly in the business of loaning money at interest upon real estate security in the State of Oregon and Territory of Washington, having an office and a managing agent at Portland, Oregon, to carry on and conduct their said business, both corporations being essentially under one and the same management in Oregon.

2. That said O. & W. T. I. Co. carried on said business in Oregon from about the year 1873 up to January 30th, 1880, when it was amalgamated with the defendant, and said bank carried on its business in Oregon from the time of its organization, in ——, 1876, up to June 30th, 1882, when it became amalgamated with the defendant.

3. That the defendant is a foreign corporation, having its home office at Dundee, in Scotland, and has had in Oregon since the said 30th day of January, 1880, a managing agent and an office, and has

carried on the business of loaning money in the same man-
67 ner as the two prior corporations aforesaid, and upon said amalgamation the defendant received the assets of said prior corporations and assumed the payment of their debts and liabilities.

4. That upon the 17th day of December, 1875, the directors of said O. & W. T. I. Co., at Dundee, appointed the plaintiff, who was and is an attorney-at-law practicing in Oregon, its legal agent by resolution in words following:

"Attorneyship.—The directors having in view the recommendation of the local boards resolved and hereby resolve to appoint Mr. Ellis G. Hughes as the legal agent of the company, this appointment to subsist during the pleasure of the Dundee board."

And at the same time furnished the plaintiff rules for his guidance in respect to his duties as such legal agent.

5. That at the time of said appointment and connected therewith there was no express agreement or arrangement made in regard to the compensation of the attorney for any of the services undertaken by the plaintiff, said services being fully enumerated as follows:

"(A.) To prepare all mortgage deeds, notes, coupons, and
68 other documents in connection with the company's loans, and to be responsible for their due execution, publication, registration, and validity.

"(B.) To be responsible that all mortgages taken are a clear and indisputable first lien upon the subjects mortgaged and to grant certificates to that effect.

"(C.) To take charge of and to conduct such proceedings as may from time to time be instituted by the company or in which the company may be interested, subject to such instructions as may be issued there-anent.

"(D.) To advise the local board and the directors of any point of legal or other interest to the company which may be developed or come under his or their notice from time to time by legislative or judicial action or otherwise.

"(E.) And generally to give his or their best attention to all matters connected with the legal department of the company's business, and to give such information or advice as may from time to time be requested or occur to him or them."

6. That in August, 1874, Addison C. Gibbs had been appointed such "legal agent" in Oregon under the same rules as stated
69 above, and from the date of his appointment until succeeded by the plaintiff said A. C. Gibbs rendered the services above enumerated.

7. That at the time of said appointment of A. C. Gibbs no provision was made for his compensation save the following:

"5. Your professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages, shall in no case exceed what the laws of the State warrant and allow, and, although the law might allow more, shall never exceed what follows." (Here follows scale of fees, a percentage on each loan.)

8. That the only compensation said A. C. Gibbs received from said

corporation or for said services " was what was paid by the borrowers and the expected commissions in case foreclosure suits were commenced."

9. That soon after said appointment of said A. C. Gibbs the plaintiff became his partner in business, under the name of Gibbs & Hughes, attorneys, at Portland, Oregon, and so remained until shortly before the said appointment of the plaintiff as such legal agent.

10. That the plaintiff received said appointment under the
70 same terms as said A. C. Gibbs had received the same, and upon the understanding that his contract in reference thereto was the same as that of said A. C. Gibbs.

11. That upon the 23d day of November, 1876, the directors of said corporation passed the following resolution and communicated the same to the plaintiff:

"Attorney.—That Mr. Hughes, the company's attorney, be remunerated by fees charged to borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

Which said resolution was received by the plaintiff in due course of mail and not objected to by him.

12. That the plaintiff continued in said employment of said corporation up to the time of its amalgamation with the defendant, in January, 1880.

13. That the plaintiff became the attorney of said corporation, the said O. & W. M. Savings Bank, upon its organization and acted in the same capacity therefor and rendered thereto similar
71 services to those rendered to said O. & W. T. I. Co., and under an understanding that he was to receive therefor the same compensation as he received from said prior corporation, and he did receive, as attorney for said bank, remuneration by fees charged to borrowers upon all certificates made by him for loans of said bank, and plaintiff continued in said employment of said bank up to the 17th day of July, 1881.

14. That from the time of the amalgamation of the O. & W. T. I. Co. with the defendant up to the 17th day of July, 1881, the plaintiff acted as legal agent of the defendant and performed for it the same services as are enumerated above, the defendant being engaged in the same business and under the same management in Oregon as the said prior corporations, and no express contract was made with the plaintiff with reference to his services to the said defendant, but the plaintiff while so acting as the legal agent of the defendant received from borrowers the same rate of fees upon each loan as previously provided with reference to said prior corporations.

15. That in and by the terms of the mortgage taken by said corporations to secure their said loans provision was made
72 whereby the borrowers agreed to pay a certain percentage upon the amount due in case of foreclosure suits, the same to be a provision for attorney's fees for plaintiff's attorney in case of such foreclosure, and it was the understanding between the plaintiff and said O. & W. T. I. Co. and said bank at the time he became

their legal agent that in case he foreclosed any of their mortgages as their attorney he should receive therefor the attorney's fee provided for in the mortgage.

16. That during all the time the plaintiff acted in said capacity of legal agent for said corporations the directors, secretary, and managing agent of said corporations in Oregon understood and supposed that the plaintiff was rendering said services and the whole thereof in consideration of the fees so to be paid him by borrowers upon loans and the foreclosure fees provided for in case of foreclosure, and that such was their contract with the plaintiff, and their dealings and communications with the plaintiff were sufficient to notify him that they so understood it from the inception of his said employment.

17. That up to the time of the termination of his said rela-
73 tion of attorney for defendant the plaintiff made no charge upon his books for general services rendered or advice given to said corporations or either of them, and made no charge and presented no claim or bill to said corporations or either of them therefor.

18. That none of said corporations or their directors, officers, or agents in Scotland or Oregon had up to the time of the termination of said employment any knowledge or notice that the plaintiff had or would make any claim for compensation from said corporation or either of them over and above the fees received on loans and the foreclosure fees, and they all understood that said other services were rendered in consideration of said fees from borrowers and foreclosures.

19. That the compensation received by the plaintiff in fees from borrowers was no more than a reasonable compensation for the services rendered in direct connection with said loans in certifying to titles and preferring the notes and mortgages therefor.

20. That the reasonable value of the general services rendered by plaintiff to said O. & W. T. I. Co. from January, 1876, to January 30th, 1880, and to the defendant from said last-named date
74 until July 17th, 1881, as provided for in divisions D and E of said rules, and aside from services directly connected with loans and foreclosures, was two thousand five hundred dollars per annum, and the reasonable value of like services rendered by him to said bank was one thousand dollars per annum for a period of five years.

21. That while acting in said capacity of attorney for said O. & W. T. I. Co., the plaintiff conducted the foreclosure suit of said company against Luther Elkins *et al.*, in which suit a decree of foreclosure was taken for the mortgage debt and for $224.80 attorney's fees in foreclosure, as provided in the mortgage, and thereafter conducted a foreclosure suit against Joseph W. Hill *et al.*, in which a decree was taken for the mortgage debt and for $531 attorney's fee, as provided in the mortgage; that in each of said foreclosure suits the mortgage property was bid in by the plaintiff for want of bidders.

22. That the defendant now owns said property so purchased upon said foreclosure suits, having acquired the same through said amal-

gamation, and the defendant and its predecessors have used diligent efforts to sell said mortgaged property for sufficient to pay
75 the said decrees, but have wholly failed to find purchasers therefor or to realize the said amounts out of the same.

23. That after the employment of the plaintiff as such attorney for said prior corporations, and after the making of the arrangement in regard to foreclosure fees mentioned in finding No. 15 above, and before the commencement of said two foreclosure suits, a conditional agreement was further made in relation to foreclosure fees by and between the plaintiff and William Reid, the managing agent of said corporations in Oregon, wherein and whereby, in consideration of the plaintiff having and conducting the foreclosure suits on all mortgages made by him, whether at the time of such foreclosure he should be the general attorney of said corporations or not, he, the said plaintiff, would not demand or require the payment of such foreclosure fees in cases where the said corporations were obliged to buy in the mortgaged land for want of bidders, but would wait therefor until the same should be realized by said corporations out of said property and until the mortgage debt, interest, and costs should first be paid out of the same, and said two foreclosures
76 were conducted while said conditional agreement was in force.

24. That since the termination of the said relation of the plaintiff to defendant as its legal agent and immediately thereafter the defendant violated the said agreement and refused to recognize the same and employed other attorneys than the plaintiff to conduct the foreclosure of mortgage drawn by plaintiff while he was the attorney of such corporations.

25. That the plaintiff has never received any fee or compensation for either of said two foreclosure suits.

Conclusions of Law.

That the defendant is indebted to the plaintiff in the sum of seven hundred and fifty-five and $\frac{80}{100}$ dollars, with legal interest thereon from the commencement of this action, and he is entitled to a judgment therefor, together with the costs and disbursements.

Respectfully submitted. W. B. GILBERT, *Referee.*

Portland, May 5, 1884.

Referee's fees: Plaintiff, $83; defendant, $17.40.

(Endorsed:) Filed May 5, 1884. R. H. Lamson, clerk.

76a And afterwards, to wit, on the 7th day of May, 1884, there was duly filed in said court defendant's exceptions & motion on referee's report in words and figures as follows, to wit:

77 In the Circuit Court of the United States for the District of Oregon.

ELLIS GIDEON HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, Defendant.

The exceptions and motion of the defendant to and upon the report of the referee, Wm. B. Gilbert, Esqr., filed herein on the 5th day of May, A. D. 1884.

Defendant excepts to the referee's finding of fact No. 17, for that it should embody an additional finding that during the time or times referred to in said finding the plaintiff did not have it in mind to make or prefer any charge for said services.

Defendant excepts to findings of fact- Nos. 19 and 20, for that they are not supported by the proof taken and for that they are extraneous and unnecessary inquiries, the issue to be determined only requiring it to be ascertained, first, whether the services sued for in the three first causes of action were such as would or might support an action in the nature of assumpsit.

Defendant excepts to finding of fact No. 24 because it is
78 not supported by the proofs, and because it is not necessary under the pleadings to find upon or determine any such condition or state of fact.

And upon the foregoing report and conclusions of law the defendant, The Dundee Mortgage and Trust Investment Company, Limited, by its attorneys, Effinger & Bourne, comes now and moves the court to affirm so much and all of said report, including findings and conclusions, as has determined that the plaintiff do have and recover nothing for and on account of his three first causes of action as the same are pleaded in his amended complaint, and for a judgment thereon dismissing the complaint as to the three said causes of action.

And it further moves the court to set aside the report as aforesaid in so far as it determines that the defendant is indebted to the plaintiff in the sum of $755.80, with interest from the beginning of this action, and that the plaintiff is entitled to a judgment therefor and for costs and disbursments; and the defendant further moves the court to allow a judgment in its favor and against the plain-
79 tiff on said cause of action and for dismissal of plaintiff's complaint thereupon.

EFFINGER & BOURNE,
Att'ys for Def't.

Original endorsed: Filed May 7, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy.

79a And afterwards, to wit, on the 9th day of May, 1884, there was duly filed in said court plaintiff's exceptions to referee's report in words and figures as follows, to wit:

80 In the Circuit Court of the United States within and for the District of Oregon.

ELLIS G. HUGHES

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED.

Comes now the plaintiff and excepts to the report of the referee filed in this cause on Monday, the fifth day of May, 1884, and to his findings of fact and conclusions of law as set out and contained in said report, in manner and form and on the grounds following:

1st. To the sixth finding of fact, in so far as the same is a finding that A. C. Gibbs rendered to the Oregon and Washington Trust Investment Company, Limited, the services set out and enumerated in finding five, for that the same is not supported by the evidence, in that there is no showing or attempt to show nor any evidence whatever as to what services, if any, the said Gibbs did, in fact, render to said company.

2d. To the seventh finding of fact, in so far as it finds that at the time A. C. Gibbs was appointed as the legal agent of the Oregon and Washington Trust Investment Company, Limited, no provision was made as to his compensation save that set out in said finding, for that the same is contrary to the evidence in the case, in that the said A. C. Gibbs received his said appointment by a letter which has been set out in full in the evidence, and of which said
81 finding, in so far as it purports to find, the terms of compensation is but in part a copy, and that in and by said letter it is provided that the fees against borrowers shall not cover other services than those enumerated in the finding.

3d. To the eighth finding of fact, in so far as it finds "that the only compensation said A. C. Gibbs received from said corporation or for said services," 1st, for that it is uncertain, in that it cannot be told whether the "said services," here referred to, are the services set out in finding five or those set out and specified in finding seven.

4th. To the eighth finding of fact, in so far as it attempts to specify for what services A. C. Gibbs received the compensation which he did receive, for — the same is not supported by the evidence; that there is no showing whatever as to what services the said A. C. Gibbs rendered or what services he received his compensation for.

5th. To the eleventh finding of fact, for that the same is insufficient and imperfect, in that it is not shown in said finding or at any place in or at all by the findings of fact or by said report that the resolution of the directors of the O. & W. T. I. Co., L., therein set out and referred to was passed in pursuance of and at the request of the plaintiff set out and contained in a letter by him to John Leng, one of the directors of said corporation, on the 30th day of

September, 1876, which is a part of the evidence in this case, and for the express and only purpose of doing away with a division of fees charged borrowers between the plaintiff and William Reid, the manager in Oregon of the business
82 of said corporation, and in that it does not show that said resolution was received by the plaintiff along with two letters, one from the said John Leng and one from William MacKenzie, the secretary of said corporation, both of said letters showing that said resolution was passed with the intent and limited to the purpose aforesaid, and both of said letters being a part of the evidence in this case; and in that it does not show that said resolution was received by the plaintiff after the receipt of a letter by the plaintiff from the said John Leng stating that said resolution had been passed in pursuance of the request of the plaintiff and for the object expressed by him, which said letter is a part of the evidence in this case; and in that it does not show that the plaintiff in his letter acknowledging the receipt of said resolution expressed to said corporation his understanding that it was passed in pursuance of his request and for the object expressed by him, which said letter is a part of the evidence in this case; the said facts as to the passage of said resolution and the writing of said letters not being anywhere disputed and there being no conflict of testimony whatever as thereto; and for that the finding of the fact of the passage of said resolution without the finding of said other facts connected therewith as above set out is unfair and misleading and does not show the true meaning, intent, and purpose nor the legal effect of such resolution as between the plaintiff and the defendant.

5th. To the fifteenth finding of fact, in so far as it is a find-
83 ing as follows: "And it was the understanding between the plaintiff and said O. & W. T. I. Co., L., and said bank, at the time he became their legal agent, that in case he foreclosed any of their mortgages as their attorney he should receive therefor the attorney's fee provided for in the mortgage," for that said finding is in so far unsupported by the weight of evidence, and in that the same is in so far contrary to the evidence in the case, and for that said finding is in so far inconsistent with and is contradicted by the 5th, 7th, and 10th findings of fact.

6th. To the thirteenth finding of fact, in so far as the same is a finding that the plaintiff, in becoming the attorney of the Oregon and Washington Mortgage Savings Bank, Limited, did so under an understanding that he was to receive therefor the same compensation as he was to receive from the Oregon and Washington Trust Investment Company, Limited, for that the same is not supported by the evidence, in that there is no testimony whatever of any such understanding or agreement, and for that the same is contrary to the evidence, in that the evidence is that there was no such understanding or agreement.

7th. To the sixteenth finding of fact, 1st, in so far as the same finds "that during all the time the plaintiff acted in said capacity of legal agent for said corporations the directors, secretary, and managing agent of said corporations in Oregon understood and supposed

that the plaintiff was rendering such services and the whole
84 thereof in consideration of the fees to be paid him by borrowers on loans and the foreclosure fees provided for in case of foreclosures, and that such was their contract with the plaintiff," for that the same is not supported by or warranted by the evidence in the case, and is contrary to the evidence; 2d, in so far as the same finds that "their dealings and communications with the plaintiff were sufficient to notify him that they so understood it from the inception of his employment," for that said finding is not supported by the evidence in the case, in that there is no evidence whatever to warrant such a finding, and for that the same is contrary to the evidence in the case, in that the evidence shows that neither by their dealings or in their communications with the plaintiff did the said corporations or either of them give the plaintiff any reason to suppose they had any such understanding; 3d, to said finding as a whole, in so far as the same applies to the Oregon and Washington Mortgage Savings Bank, Limited, for that the same is contrary to the evidence, in that it affirmatively appears that the officers of that bank, the secretary and directors, had no understanding on the subject, and for that it is unsupported by evidence, in that it affirmatively appears that neither they or its manager in Oregon held any communication whatever with the plaintiff on the subject of his fees for any service or had any dealings with him relative thereto.

8th. To the seventeenth finding of fact, in so far as the same finds that the plaintiff made no charge for general services or
85 advice against said corporations, for that the same is in said respect contrary to all the evidence in this cause and is unsupported by any evidence whatever.

9th. To the eighteenth finding of fact, 1st, in so far as that it is a finding that there was no knowledge or notice that the plaintiff had or would make claim from said corporations or either of them over and above fees received on loans and the foreclosure fees, for that the same is unsupported by the evidence in the case and for that the same is contrary to the evidence in the case, there being positive evidence which is incontradicted of other claim having been made and allowed; 2d, in so far as that it is a finding that "they all understood that said other services were rendered in consideration of said fees from borrowers and foreclosures," for that as to the Oregon and Washington Mortgage Savings Bank, Limited, — the said finding, so far as the officers and directors in Scotland had any such understanding, there is no evidence whatever to support such finding and the same is unsupported by the evidence, and that there is evidence that on their part there was no such understanding and the same is contrary to the evidence, and for that as to the other corporations and the officers of said bank in Oregon said finding is contrary to the evidence.

10th. To the whole of said findings of fact, for that it is not found therein whether or not the plaintiff rendered to the Oregon and Washington Trust Investment Company, Limited, the general

86 services set out and alleged in his complaint to have been rendered to said corporation, though the fact of the rendition of said services was put in issue and evidence offered thereon.

11th. To the conclusions of law, in so far as the same is in legal effect a finding that the plaintiff is not entitled to recover of the defendant on his claims as for services rendered the several corporations as set out in his complaint other than the foreclosure fees (which are allowed and in and by said conclusions of law found to be due plaintiff), for that the said conclusions of law whereby it is found that the plaintiff is not entitled to recover of and from the plaintiff on his aforesaid claims are contrary to the evidence in the case, and the law is applicable to the facts proven herein.

Wherefore the plaintiff, showing to the court as grounds thereof the report of the said referee and the exceptions and objections to its findings of fact and conclusions of law hereinbefore stated, moves that said report in all respects, wherein the same is not excepted to by the plaintiff as hereinbefore set out and shown, may, as to its findings of fact and conclusions of law, be affirmed, and that, so far as the same is excepted to by the plaintiff as aforesaid, *that* the same may be set aside, and that the plaintiff may have judgment herein in accordance with the true facts in this case and the law applicable thereto against the defendant for the full amount

87 of his claim made in this complaint, to wit, for the full sum of $19,775.00, with interest thereon from the date of the brin-ing of this action, and for his costs and disbursements herein.

GEO. H. WILLIAMS AND
C. B. BELLINGER,
Att'ys for Pl'ff.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Henry Wagner, being duly sworn, on oath do say that I served the within exceptions to the report of the referee by plaintiff, in the case of Ellis G. Hughes vs. The Dundee Mortgage and Trust Investment Company, Limited, on William H. Effinger, of Effinger and Bourne, at his office, in the city of Portland, on the 9th day of May, A. D. 1884, between the hours of two and four o'clock p. m., by delivering to said William H. Effinger in person a copy thereof, duly certified to be — correct copy thereof by Ellis G. Hughes.

HENRY WAGNER.

Subscribed and sworn to before me this 9th day of May, A. D. 1884.

JNO. BEVERIDGE,
Notary Public for Oregon.

Original endorsed: Filed May 9, 1884. R. H. Lamson, clerk.

87a And afterwards, to wit, on Monday, the 7th day of July, 1884, the same being the 35th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

88 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED. } No. 881.

JULY 7, 1884.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. George H. Williams and Mr. C. B. Bellinger, of counsel, and the defendant, by Mr. Wm. H. Effinger, of counsel, and this cause comes on to be heard upon the exceptions of both parties to the report of the referee herein; and, the court having heard counsel, the cause is continued until to-morrow.

88a And afterwards, to wit, on Tuesday, the 8th day of July, 1884, the same being the 36th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

89 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED. } No. 881.

JULY 8, 1884.

Now, at this day, comes the parties in the above-entitled cause, by their respective counsel, as of yesterday, and the hearing upon the exceptions to the report of the referee is continued; and the court, having heard the arguments of counsel, will advise thereof.

89a And afterwards, to wit, on the 8th day of August, 1884, there was duly filed in said court the findings of court in words and figures as follows, to wit:

90 In the Circuit Court of the United States for the District of Oregon.

ELLIAS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED. } No. 881.

AUGUST 8, 1884.

This cause came on to be heard on the exceptions of the plaintiff and defendant to the findings of the referee, and was argued by Mr.

George H. Williams and Mr. Charles B. Bellinger, of counsel for the plaintiff, and Mr. William H. Effinger, of counsel for the defendant; and on consideration thereof, it is ordered that the findings of the referee be, and they are hereby, set aide, and the court now finds and states the conclusions of fact in the case as follows:

(1.) That the Oregon and Washington Trust Investment Company and the Oregon and Washington Mortgage Savings Bank were foreign corporations, having their home offices at Dundee, in Scotland, and were engaged chiefly in the business of loaning money at interest upon real estate security in the State of Oregon and Territory of Washington, having an office and a managing agent at Portland, Oregon, to carry on and conduct their said business, both corporations being essentially under one and the same management in Oregon.

91 (2.) That said O. & W. T. I. Co. carried on said business in Oregon from about the year 1873 up to January 30th, 1880, when it was amalgamated with the defendant, and said bank carried on its business in Oregon from the time of its amalgamation, in ——, 1876, up to June 30th, 1882, when it became amalgamated with the defendant.

(3.) That the defendant is a foreign corporation, having its office at Dundee, in Scotland, and has had in Oregon since the 30th day of January, 1880, a managing agent and an office, and has carried on the business of loaning money in the manner as the two prior corporations aforesaid, and upon said amalgamation the defendant received the assets of said prior corporations and assumed the payment of their debts and liabilities.

(4.) That upon the 17th day of December, 1875, the directors of the said O. & W. T. I. Co., at Dundee, appointed the plaintiff, who was and is an attorney-at-law practicing in Oregon, its legal agent by resolution in words following:

"Attorneyship.—The directors having in view the recommendation of the local board resolved and hereby resolve to appoint Mr. Ellis G. Hughes as the legal agent of the company, this appointment to subsist during the pleasure of the Dundee board."

And at the same time furnished the plaintiff a written schedule of his duties and responsibilities as follows:

92 "(A.) To prepare all mortgages, deeds, notes, coupons, and other documents in connection with the company's loans, and to be responsible for their due execution, publication, registration, and validity.

"(B.) To be responsible that all mortgages taken are a clear and indisputable first lien upon the subject mortgaged and to grant certificates to that effect.

"(C.) To take charge of and to conduct such proceedings as may from time to time be instituted by the company or in which the company may be interested, subject to such instructions as may be issued there-anent.

"(D.) To advise the local board and the directors of any point of legal or other interest to the company which may be developed or

come under his or their notice from time to time by legislative or judicial action or otherwise.

"(E.) And generally to give his or their best attention to all matters connected with the legal department of the company's business, and to give such information or advice as may from time to time be requested or occur to him or them."

(5.) That there never was any express agreement between the plaintiff and the said Oregon and Washington Trust Investment Company in regard to the compensation of the plaintiff for the services undertaken and rendered by him under said appointment and schedule, except that for the services rendered under subdivisions A and B of said schedule he was to receive a percentage
93 on the amount loaned, to be paid by the borrowers.

(6.) That the local manager of said corporation at Portland claimed and received a portion of this percentage from the attorney that immediately preceded the plaintiff in this employment, and claimed and received the same from the plaintiff for some months after his appointment, when he objected to the division of his fees and brought the matter before the corporation, which, on November 23, 1876, passed the following resolution on the subject and communicated the same to the plaintiff:

"Attorney.—That Mr. Hughes, the company's attorney, be remunerated by fees charged to borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

Which said resolution was received by the plaintiff in due course of mail and not objected to by him.

(7.) That the plaintiff continued in said employment of said corporation up to the time of its amalgamation with the defendant, in January, 1880.

(8.) That the plaintiff became the attorney of said corporation, the O. &. W. M. Savings Bank, upon its organization and acted in the same capacity therefor, and rendered thereto similar services to those rendered to said O. &. W. T. I. Co., and upon the same terms, up to July 17, 1881.

94 (9.) That from the time of the amalgamation of the O. & W. T. I. Co. with the defendant up to the 17th day of July, 1881, the plaintiff acted as legal agent of the defendant and performed for it the same services as specified in the schedule aforesaid and upon the same terms.

(10.) That in and by the terms of the mortgages taken by said corporation to secure their said loans provision was made whereby the borrowers agreed to pay a certain percentage upon the amount due, in case of foreclosure suits, as an attorney fee in such case.

(11.) That during the time of his employment by said corporations or since the plaintiff never made any charge upon his books for general services rendered or advice given them or either of them, and never presented any claim to them or either of them therefor or gave them any notice thereof; nor did said corporations or either of

them ever inform the plaintiff that they expected him to give such advice and perform such general service gratuitously or in consideration of being allowed to charge and receive fees from borrowers for services under subdivisions A and B of the schedule aforesaid or otherwise without direct compensation therefor.

(12.) That the compensation received by the plaintiff from borrowers for the services rendered under subdivision- A and B of the schedule aforesaid according to the scale of March, 1875, referred to in the resolution of November 23, 1876, was, on town loans
95 ranging from five hundred to four thousand dollars, from one and one-eighth to two per centum of the amount of the loan, and on country loans from one and one-quarter to two and one-half per centum thereon, and on all loans over four thousand dollars it was the practice to charge not more than one per centum, and that the amount thus received was only a reasonable compensation for such services and the expense attendant thereon.

(13.) That from January 1, 1876, to July 17, 1881, said corporations were under one local management and practically constituted but one client and were so held and regarded by the plaintiff, and a reasonable retainer or compensation for the services rendered to them by him during such period under subdivisions D and E of the schedule aforesaid is twelve hundred dollars a year.

(14.) That after the appointment of the plaintiff and prior to the commencement of the two foreclosure suits in the complaint mentioned it was agreed between the plaintiff and the last manager of said corporations that the plaintiff would conduct all suits for the foreclosure of mortgages given to either of said corporations under subdivision C of said schedule for the attorney fee provided in said mortgage, and in consideration that the plaintiff should have the right to conduct all such suits for such compensation. He further agreed with said manager that he would not demand or re-
96 quire the payment of such foreclosure fees in cases when the said corporations were obliged to buy in the mortgaged land for want of bidders, but would wait therefor until the same should be realized by said corporation out of said property and until the mortgage debt, interest, and costs should first be paid out of the same, and said two foreclosures were conducted while said conditional agreement was in force.

(15.) That about January 1, 1882, the plaintiff ceased to be the legal agent or attorney of the defendant, and immediately thereafter the defendant violated the said agreement and refused to recognize the same and employed other attorneys than the plaintiff to conduct the foreclosure of mortgages drawn by plaintiff while he was the attorney of such corporation.

(16.) That while acting in said capacity of attorney for said O. & W. T. I. Co. the plaintiff conducted the foreclosure suit of said company against Luther Elkins *et al.*, in which suit a decree of foreclosure was taken for the mortgage debt and for two hundred and twenty-four dollars and eighty cents attorney fees on foreclosure, as provided in the mortgage, and thereafter conducted a foreclosure suit against Joseph W. Hill *et al.*, in which a decree was taken for

the mortgage debt and for five hundred and thirty-one dollars attorney fee, as provided in the mortgage.

(17.) That in each of said foreclosure suits the mortgaged property was bid in by the plaintiff therein for want of bidders, and
97 that the defendant now owns said property so purchased upon said foreclosure suits, having acquired the same through said amalgamation, and the defendant and its predecessors have used diligent efforts to sell said mortgaged property for sufficient to pay said decrees, but have wholly failed to find purchasers therefor or to realize the said amounts out of the same, and that the plaintiff has never received any fee or compensation for either of — two foreclosure suits.

And as a conclusion of law the court now finds and states as follows:

That the defendant, by reason of the premises, is indebted to the plaintiff for and on account of the services rendered under Subdivisions D and E of said schedule in the sum of six thousand seven hundred and fifty dollars, or at the rate of twelve hundred dollars a year for the period of five years and seven and a half months from January 1, 1876, and in the sum of seven hundred and fifty-six dollars and eighty cents for fees earned in said two foreclosure suits and remaining due and unpaid, and that the plaintiff is entitled to a judgment against the defendant for said sums, with legal interest thereon—nine hundred dollars and eighty-one cents—for one year and six months, or from the commencement of the action, in all the sum of eight thousand four hundred and seven dollars and sixty-one cents, together with his costs and disbursements.

(Signed) DEADY, *J.*

98 Original endorsed: Filed Aug. 8, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

98*a* And afterwards, to wit. on the 14th day of August, 1884, there was duly filed in said court the opinion in words and figures as follows, to wit:

99 *Action to Recover Money for Legal Services.*

U. S. Circuit Court, District of Oregon. Friday, August 8, 1884.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE TRUST INVESTMENT COMPANY. } No. 881.

(1.) Implied contract.—Whenever one persons does work or service for another with his consent and there is no agreement as to compensation the law implies a contract to pay what the same is reasonably worth, but when the circumstances of the case clearly repel the idea that the work or services were done with the expectation of payment being either made or received no such contract will be implied.

(2.) Case in judgment.—The plaintiff acted as attorney for the defendant and amalgamated corporations engaged in loaning

money in Oregon and Washington under written instructions as to his duties and responsibilities. It was his duty to examine titles to real property offered as security for loans, for which he was permitted to charge the borrowers specific fees. He was also to aid and advise the corporations generally in all matters affecting their interests, but for this service no compensation was expressly provided. The fees received from borrowers were no more than a reasonable compensation for the services rendered them. Under these circumstances the plaintiff acted as the sole and general counsel and adviser of the corporations for some years without making any charge or rendering any account of his services or receiving any intimation from the corporations that they did not expect to pay him for them. Upon being sued to recover the reasonable value of these services the corporations claimed that it was "understood" that the plaintiff was to perform these services gratuitously or in consideration of the fees received from borrowers. Held (1) that the mere understanding of either party to the contract was no part of it and did not bind the other, and that there was nothing in the circumstances of the case or the conduct of the parties sufficient to prevent or repel the legal implication of a promise by the corporations to pay the plaintiff what his services were reasonably worth, and (2) that the plaintiff, not having kept any account of his services and being unable to prove any specific items, ought not to recover more than a reasonable annual retainer therefor.

DEADY, *J.*:

This cause comes before the court on exceptions by both parties to the report of the referee. It was commenced on February 12, 1883, to recover the sum of $21,255 for professional services as an attorney and counsellor-at-law. It was tried by the referee upon an amended complaint, in which the sum demanded was reduced to $19,155, and an amended answer and the replication thereto.

From these it appears that prior to the commencement of this action the Oregon and Washington Trust Investment Company, the Oregon and Washington Mortgage Savings Bank, and the Dundee Mortgage and Trust Investment Company were each foreign corporations formed under the laws of Great Britain and engaged, among other things, in the business of loaning money in Oregon and Washington upon note and mortgage, with a principal office at Dundee, Scotland, and a common local office, board, and manager at Portland, Oregon; that the plaintiff was the attorney for these corporations in this country for the periods following: For the first one, from January 1, 1876, to January 1, 1880, when it was amalgamated with the latter; for the second one, from July 1, 1876, to July 17, 1881, when it was amalgamated with the latter, and for the latter from January 1, 1880, to July 17, 1881; that by the terms of his employment the plaintiff was required to examine and pass on the title to any real property offered as security for a loan and certify the result to the local manager, and to prepare and have prop-

erly executed and recorded all notes and mortgages taken by the corporations, for which service he was to receive a certain percentage on each loan to be paid by the borrower; and generally to aid and advise in any matter of interest to the corporations.

It is on account of services rendered under this latter provision that this action is brought, less the sum of $756.80 for fees earned in foreclosing two of said mortgages for the defendant.

By the amalgamation of the two elder corporations with the defendant, it is admitted that it succeeded to their rights and assets and became liable for any valid claim or indebtedness against either of them.

It is not alleged in the complaint that there was any express agreement to pay a fixed or any price for these general services, but only that they were rendered at the request of the corporations, and that their reasonable value is the sum sued for. In reply to a demand for a bill of particulars, the plaintiff filed a statement to the effect that he could not furnish an itemized account; that he was the general attorney and counsellor of these corporations during the period charged for and the sole legal adviser of their local manager; that he was consulted almost daily by said manager on the business and affairs of the corporation, but made no current charge therefor, expecting to be paid a gross sum per annum, to be thereafter agreed on by the parties.

It is alleged in the answer that it was "understood and agreed" between the parties that the plaintiff was not to receive any compensation for his services from any of these corporations, but "was to render, without charge, such general advice as might be desired by either of said corporations," in consideration of the fees he received from borrowers. The answer admits the plaintiff's services in foreclosing the mortgages as alleged, and also the value of them, but avers that by special agreement they were to be paid out of the proceeds of the sale of the mortgaged premises after the payment of the debt due the corporation, and that the defendant was obliged to bid in the property sold in said foreclosure suits for the amount of the decree and is not able to sell the same; and therefore said fees are not yet due from the defendant.

The replication denies that it was "understood or agreed" that the plaintiff should furnish the general service he did for nothing, or on account of the fees received from borrowers, and admits the agreement stated in the answer as to the payment of the plaintiff's fees in foreclosure cases, but alleges that such agreement was made upon the express condition that the plaintiff was to have the foreclosure of all of the defendant's mortgages, which condition the defendant has failed to keep; and denies that the defendant has not been able to sell said mortgaged premises. On July 17, 1881, a change was made in the mode of compensating the plaintiff, by which the defendant agreed to pay him for the examination of titles at the rate of $1\frac{3}{8}$ per centum on the amount of all loans, including loans renewed, and to allow him to charge borrowers with expense of travel incurred in such examination, whereby his receipts were materially increased, and in consideration of which he expressly undertook to give the

defendant verbal advice about its affairs without further charge; but the defendant soon became dissatisfied with this method of compensation, and the result was that as the plaintiff would not perform the service on terms less favorable to himself the relation terminated about the end of the year.

The facts about the foreclosure fees appear to be as stated in the replication, except that the defendant has not been able to sell the property, and the referee so found, and that the defendant is, therefore, now liable to the plaintiff for the amount of them.

Concerning the claim for compensation for general services, the only question arising on the pleadings is their value and whether there was any agreement that they should be rendered gratuitously or in consideration of the fees received from borrowers.

Prior to December, 1875, when the plaintiff was appointed attorney for the Or. & Wash. T. I. Company, he was in partnership for a short time with Mr. A. C. Gibbs, the then attorney of said corporation, and was familiar with the fact that his fees for abstracts, searches, investigation of titles, preparing and recording mortgages, not exceeding a certain percentage on each loan, were to be paid by the borrowers, and that there was no express provision for his compensation by the corporation for any service he might render it directly.

When the plaintiff became the attorney of said corporation he was furnished with the following schedule concerning his duties and responsibilities:

A. To prepare all mortgages, deeds, notes, coupons, and other documents in connection with the company's loans, and to be responsible for their due execution, publication, registration, and validity.

B. To be responsible that all mortgages taken are a clear and indisputable first lien upon the subjects mortgaged, and to grant certificates to that effect.

C. To take charge of and to conduct such proceedings as may from time to time be instituted by the company or in which the company may be interested, subject to such instructions as may be issued thereanent.

D. To advise the local board and directors of any point of legal or other interest to the company which may be developed or come under his or their notice, from time to time, by legislative or judicial action or otherwise.

E. And generally to give his best attention to all the matters connected with the legal department of the company's business, and to give such information and advice as may, from time to time, be requested or occur to him.

And was advised that his compensation for services in connection with taking security for loans should be paid by the borrowers, as in the case of his predecessor.

100 On March 3, 1875, a scale of fees, to be paid the attorney by borrowers, was fixed in the Dundee office, in which the percentage allowed the attorney on eight classes of loans, ranging from $500 to $4,000, was from 2¼ to 1½ per centum on the amount

loaned; but all loans over the latter sum paid a uniform rate of one per centum. This was the rule when the plaintiff was employed, but the local manager claimed and had been privately permitted to take from this allowance one half of one per centum to aid in compensating him for his services to the corporation. To this division of his fees the plaintiff soon demurred, on the ground that what was left for him was not at — adequate compensation for the labor, expense, and responsibility involved in the service to borrowers, and after some correspondence with the Dundee office it was arranged that the plaintiff should receive the whole amount of the fees paid by borrowers for services in and about the applications for loans. The official resolution on the subject was passed on November 23, 1876, and is in these words:

"Attorney.—That Mr. Hughes, the company's attorney, be remunerated by fees charged to borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

The referee found (1) that there was no express contract between the plaintiff and these corporations concerning compensation for his direct and general service to them, butthat during the time of his employment by them the directors and local manager "understood and supposed" that the plaintiff was rendering said services "in consideration of the fees" paid him by borrowers and the fees that might be received in foreclosure cases, and "that such was their contract with the plaintiff, and their dealings and communications with the plaintiff were sufficient to notify him that they so understood it from the inception of the employment;" (2) that prior to the termination of the employment the plaintiff made no charge or claim for such services; (3) "that the compensation received by the plaintiff in fees from borrowers was no more than a reasonable compensation for the services rendered in direct connection" with the application for loans, and (4) that the reasonable value of the general services rendered by the plaintiff to the defendant and amalgamated corporations, as provided in paragraphs 4 and 5 of the rules aforesaid, is the amount stated in the complaint.

The defence that it was "agreed" between the parties that the plaintiff should perform the general service in consideration of the fees received from the borrowers for the particular service is not sustained. The burden of proof in this respect is on the defendant and it has utterly failed to prove any such agreement.

But it is also alleged in the answer that it was "understood," and the referee has found that the defendant and the amalgamated companies "understood," during the time these general services were being rendered that they were performed gratuitously or in consideration of the fees paid by borrowers; but the understanding a party may happen to have about any matter does not constitute a contract between him and another to that effect. To amount to a contract —*aggregatio mentium*—the understanding must be "mutual;" but even a "mutual understanding" is not, strictly speaking, a contract, but rather indicates a common knowledge or apprehension of a con-

tract or transaction. However, the term is sometimes used in this sense in a loose way to signify a contract. In Livingstone *v.* Ackeston, 5 Cow., 53, cited by counsel for the defendant, Sutherland, J., speaking for the court, says: "No doubt the services of the plaintiff, having been performed for the benefit of the defendant, with his knowledge and approbation, the law will imply a promise to pay for them, unless it appears that they (the plaintiff and defendant) understood that no compensation was to be made."

Nor is it material if the plaintiff, as found by the referee, had reason to believe that the defendant understood that by the contract the plaintiff was to perform these general services without charge, so long, at least, as he did not, by sufficient word or deed, cause or authorize such understanding or conclusion. The finding is, therefore, immaterial, and judgment might be given, notwithstanding it, for the value of the services as found by the referee.

Upon the findings, then, taken according to their legal effect, these general services were furnished these corporations at their request and for their benefit without any express agreement as to the mode or measure of compensation therefor, and such, in my judgment, is the decided weight of the evidence. In such a case the law in the interest of justice and right implies or supplies such a promise or agreement concerning the compensation as fair and honest men ought to have made. 3 Black., 443; 1 Pars. Con., 4; Ogden *vs.* Saunders, 12 Whea., 341.

Whenever one person does any work or service for another with his consent and there is no agreement as to compensation the law implies a contract contemporaneous with the doing of the work or service to pay what the same is reasonably worth, and the burden of proof is upon the party who, admitting the premise, denies the conclusion or undertakes to avoid or prevent this implication by showing that the work or service was performed gratuitously or included in the compensation made for some other service or thing.

As, for instance, that the party for whom the work or service is done declared at the time he would not pay for it. For the law will not imply a promise by a party against his express declaration to the contrary, unless, as may happen, he is under a legal obligation to that effect, paramount to his own will.

And such, and no more, is the doctrine of Whiting *v.* Sullivan, 7 Mass., 107, cited by counsel for defendant, in which it was held that the law would not imply a promise by the defendant to pay for the keeping of a horse in the face of his express declaration to the plaintiff, at the time the horse was delivered to him, that he would not. The case of Central Bridge Corporation *v.* Abbott, 4 Cush., 473, is a good illustration of the exception to this rule, where the legal obligation of the party is paramount to his will. The defendant crossed the plaintiffs' bridge, claiming that he was exempt from the payment of toll and declaring that he would not pay any; but the court, having found that he was not exempt, held the law implied a promise on his part to pay the legal tolls, notwithstanding his declared intention to the contrary.

The case of St. Jude's Church *v.* Denberg, 31 Mich., 284, also

cited by counsel for defendant, stands upon another well-known exception to the rule. There a vestryman of the plaintiff in error and an active member of the society voluntarily acted as sexton for a time, and the court held that the law did not imply a contract to pay, because the circumstances clearly repelled the idea that the services were rendered or received with the expectation that payment therefor was to be made or claimed.

The contract which the law implies in any case "is co-ordinate and commensurate with duty" and never goes beyond the obligation supposed to be understood and acknowledged by all. 1 Par. Con., 4.

Ordinarily the law does not imply a contract to pay for services rendered by one member of a family to another—even by an adult child to the parent with whom he lives, or by the officers of charitable or religious societies to the society, because it is not commonly understood or acknowledged that such services, in the absence of express contract to that effect, are either rendered or received with the expectation of payment therefor being either made or claimed. An implied contract grows out of the acts of the parties and never includes any stipulation or provision but such as ought, under the circumstances, to have been made. Ogden *v.* Saunders, *supra*.

In this case the contract between the parties is contained in the document defining the plaintiff's duties and delivered to him on his appointment. This instrument was prepared by the corporation and whatever of omission or uncertainty there is about it must be taken most strongly against the defendant. If it was intended or expected that the general service to the corporation should be compensated for by the fees received from borrowers it was a simple and natural thing to have said so, unless it was apprehended that such an arrangement would make the loans usurious and void; and if it was thought lawful and desirable to exact from the plaintiff the gratuitous performance of these services as a condition or in consideration of giving him the opportunity to earn the fees from borrowers, why was it not mentioned? The instrument is evidently prepared with skill and care, and while it expressly and minutely provides for the attorney's "fees against borrowers," it is silent as to the compensation for the wide field of general service required to be performed by him for the corporation.

101 But significance is sought to be given to the word "remunerated" in the resolution of November 23, 1876, in this connection, and it is seriously contended that this resolution proves that the contract was that the "fees charged to borrowers" were to remunerate the plaintiff for his services to the corporation, as well as the borrowers. Abstracted from its surroundings and read without reference to the circumstances that led to its adoption, it may be admitted that this resolution is susceptible of this construction, but when it is considered that it would make the loans of the corporation liable to be pronounced usurious it ought not to be adopted, unless for peremptory reasons; but when it is also remembered that this resolution is simply the result of a negotiation or correspondence between the plaintiff and the corporation, in which the former reasonably and justly claimed that he ought not to be required to

divide his fees from borrowers with the local manager of the latter, but that he ought to be allowed to retain the whole of them, according to the terms of his appointment, and for the further reason that they were not a lucrative compensation for the services at best, there is no ground whatever for such construction.

Let us next consider what, if anything, there is in the circumstances of the case and the conduct of the parties to the contract to repel the conclusion and prevent the implication that the general service was performed and received with the expectation that it would be paid for according to its value, in addition to the fees received from borrowers.

If the fees received from borrowers were very lucrative and much beyond the real value of the services rendered to them, this would be a fact, more or less material, according to the circumstances, tending to show that they were really intended and understood by the parties as a compensation for general services as well, and however immoral or unjust such a transaction might be considered as against the borrowers, probably the plaintiff ought not to be heard to impugn it. If these general services were also of a trivial or mere routine character and comparatively of infrequent occurrence, this would enhance the probability that they were covered by the fees allowed to be taken from borrowers; but the exact contrary is the fact, so far at least as the fees to borrowers are concerned.

During the first year the Or. and Wash. T. I. Company, according to the testimony of the local manager, loaned about $300,000, and one year its loans reached about $500,000. The defendant's loans did not exceed $100,000, but it was also doing a savings-bank business and purchased State and county warrants. First and last, these corporations have loaned in Oregon and Washington about four millions, and had out therein at one time as much as $1,700,000. During this period they declared annual dividends of from six to ten per centum on their capital stock and made from 10 to 21 per centum of profits thereon.

The plaintiff's compensation for preparing or procuring abstracts, examining titles, making notes and mortgages and procuring them to be recorded in connection with these loans, varying in amount from $500 upward, was less than average of ½ per centum on the amount loaned, and, in addition to the ordinary responsibility of an attorney, he absolutely guaranteed that in each case the title was good and the corporation got a first lien. During this period of nearly six years his gross income from this source did not reach $30,000, and the expenses of the business were quite half of that. The plaintiff has exhibited a detailed statement of the loans made and the fees received by him during the last year of his employment, which he says was the best one. The amount loaned is $607,200, divided among 326 loans, and his percentage is $6,925.55, or 1.14 per centum of that amount.

There is nothing in these facts calculated in the least degree to repel the implication that the corporation promises to pay the plaintiff specifically for his general services to them whatever they were worth. The compensation received from the borrowers, so far

from being lucrative, was very moderate. I am quite certain that the ordinary charge for this service by a reputable attorney, without even the special guarantee, would have been not less than two per centum.

But it must be admitted that the conduct of the parties concerning the compensation of these general services is not distinguished for openness or candor. For nearly six years the corporations demanded and received these services and the plaintiff furnished them, without a word or intimation on either side that they were or were not to be paid for; and the plaintiff now frankly admits that while he always intended to claim a specific compensation for these services, he did not do so while the employment lasted, for fear he would have trouble with the corporations, about the amount of it at least, and probably lose their business; and that in the absence of express provision in the contract concerning such compensation he had a right to rely upon the promise to pay which the law would imply and to claim the benefit of it whenever it best suited his interest or convenience, and within such time as the law would permit.

But his conduct in this particular is more than balanced by that of the corporations. From time to time they requested and received these services from the plaintiff, well knowing that they had made no express provision concerning his compensation therefor, and never intimated to him that they did not intend to pay for them or that they should claim that he ought to furnish them gratuitously in consideration of the fees he was allowed to take from borrowers. There is nothing, then, in the circumstances of the case or the conduct of the parties while acting under the contract that will repel or prevent the convenient and just implication by the law of a promise by the corporations to pay the reasonable value of these services. They were furnished at their request and received without any indication that they did not intend to pay for them. The fees received from the borrowers were but a moderate compensation for the services rendered them, and it is not reasonable to suppose that they were taken and received by the plaintiff in satisfaction of the services rendered the corporations also.

The referee has found that these services are reasonably worth the sum stated in the complaint.

But I cannot agree with this conclusion for several reasons. The plaintiff kept no account of these services, and is therefore unable to give a detailed statement of them. The burden of proof is on him to show in what the services consisted and their value. They may have been worth $2,500 a year, but the court cannot assume that they were without the direct proof of one specific item. The failure to keep an account of these services is the fault of the plaintiff, and he must suffer for it, if any one.

From the evidence it may be inferred that the plaintiff was freely plied with verbal and perhaps trivial questions by the local manager; but he does not appear to have drafted any agreements or furnished any written opinions. It also appears that at some time he was consulted about some scheme to escape local taxation; that he

went before the county court to get the defendant's assessment changed or reduced, and that he attended the biennial sessions of the Legislature when the corporations were threatened with hostile legislation, but no specific service of even this kind is mentioned or shown. Under the circumstances the only measure of compensation which I think can be safely adopted is to allow the plaintiff an annual sum as a retainer; and in so doing I must consider these three corporations as constituting one continuous client from January 1, 1876, to July 17, 1881, which for convenience may be considered five years and seven and a half months; and in fact this is the way the plaintiff treated them, and he so testified.

This retainer, in my judgment, should not exceed $1,200 a year, or $6,750 for the whole period. Add to this the two foreclosure fees of $756.80, and we have the sum of $7,506.80, which the plaintiff is entitled to recover, with legal interest—$900.81—from the commencement of the action or the period of one year and six months, making in all the sum of $8,407.61.

The findings of the referee are set aside and findings by the court in accordance with this opinion will be filed in their stead.

Mr. George H. Williams and Mr. Charles B. Bellinger, for the plaintiff.

Mr. William H. Effinger, for the defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

102 Original endorsed: Filed Aug. 14, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

102*a* And afterwards, to wit, on Friday, the 15th day of August, 1884, the same being the 54th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

103 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED. } No. 881.

AUGUST 15, 1884.

Now, at this day, comes the plaintiff in the above-entitled cause, in *propria persona*, and moves the court for judgment upon the findings of the court on the trial of said cause, now on file herein; and thereupon it is considered that said plaintiff do have and recover from said defendant the sum of eight thousand four hundred and seven dollars and sixty-one cents damages, and his costs and disbursements herein, taxed at $390.05.

103*a* And afterwards, to wit, on the 15th day of May, 1884, there was duly filed in said court a cost bill in words and figures as follows, to wit:

104 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,
vs.
DUNDEE MORTGAGE & TRUST INVEST. CO., LIMITED, Defendant. } No. —.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's fees	$47 10
Marshal's fees	4 70
Printing brief	227 50
Costs in lower court	
Advertising	
Depositions	
Attorney's fee	20 00
Attorney's fee for taking — depositions, at $2.50 each	
Master's fees	
Referee's fees	83 00
Disbursements, transcript county records used in evidence	5 75
Witness' fees	2 00
Total, taxed at	$390 05

R. H. LAMSON, *Clerk*,
By G. G. GAMMANS, *Deputy*.

105 [Endorsed:] In the cir. court of the United States for the district of Oregon. Ellis G. Hughes, plaintiff, *vs.* Dundee Mort. & Trust Inv. Co., Lim., defendant. Cost bill. Copy. Filed August 15, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

DISTRICT OF OREGON, *ss*:

I, Ellis G. Hughes, being duly sworn, say: I am plaintiff in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that I *is* entitled to recover the same from the defendant.

(S'g'd) ELLIS G. HUGHES.

Subscribed and sworn to before me this August 15, 1884.

R. H. LAMSON, *Clerk*,
By G. G. GAMMANS, *Deputy Clerk*.

106 In the Circuit Court of the United States for the District of Oregon.

ELLIS G. HUGHES, Plaintiff,

vs.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED.

Know all men by these presents that we, The Dundee Mortgage and Trust Investment Company, Limited, and Thomas Hislop and John McCraken, are held and firmly bound unto Ellis G. Hughes in the sum of fourteen thousand dollars, to be paid to the said Ellis G. Hughes, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated August 21, 1884.

Whereas the above-named The Dundee Mortgage and Trust Investment Company, Limited, has taken a writ of error out of the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the circuit court of the United States for the district of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named The Dundee Mortgage and Trust Investment Company, Limited, shall prosecute said writ of error to effect and answer all costs and damages if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(S'g'd) THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, [SEAL.]
By EDMUND ROBERTSON, *Attorney-in-Fact.*

(S'g'd) THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, [SEAL.]
By HUGH ROGERS, *Its Agent.*

(S'g'd) THOMAS HISLOP. [SEAL.]

(S'g'd) JOHN McCRAKEN. [SEAL.]

Signed, sealed, and delivered in presence of—

——— ———.

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, Thomas Hislop, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of fourteen thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

(S'g'd) THOS. HISLOP.

Subscribed and sworn to before me this August 21, 1884.
[Seal of U. S. Circuit Court for Oregon.]

R. H. LAMSON,
Clerk U. S. Circuit Court for Oregon,
By G. G. GAMMANS, *Deputy.*

107 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, John McCraken, of the city of Portland, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth, in property situated therein, the sum of fourteen thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

(S'g'd) JOHN McCRAKEN.

Subscribed and sworn to before me this 25th of August, 1884.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

DISTRICT OF OREGON:

I hereby approve of the within bond.
August 25, 1884.
(Signed) DEADY, *J.*

Original endorsed: No. —. U. S. circuit court, district of Oregon. Ellis G. Hughes vs. The Dundee Mortgage and Trust Investment Company, Limited. Copy. Bond. Filed August 25, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

108 *Writ of Error.*

THE UNITED STATES OF AMERICA, ss:

In the Supreme Court of the United States.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, Plaintiff in Error,
vs.
ELLIS G. HUGHES, Defendant in Error. } No. —.

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before the Honorable Matthew P. Deady, one of you, between Ellis G. Hughes, plaintiff and defendant in error, and the Dundee Mortgage and Trust Investment Company, Limited, defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and

full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-four, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this August 25, 1884.

[Seal of U. S. Circuit Court of Oregon.]

(S'g'd) R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon.
By G. G. GAMMANS, *Deputy Clerk.*

109 Original endorsed: In the Supreme Court of the United States. The Dundee Mortgage and Trust Investment Company, Limited, plaintiff in error, vs. Ellis G. Hughes, defendant in error. Copy. Writ of error. Filed August 25, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

110 THE UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, R. H. Lamson, clerk of the United States circuit court for the district of Oregon, do hereby certify that the foregoing copy of journal entries and pleadings, including report of referee and findings of court, in the case of Ellis B. Hughes vs. The Dundee Mortgage & Trust Investment Company, Limited, has been by me compared with the originals, and that it is a correct transcript therefrom and of the whole of such originals as the same appear of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 26 day of August, 1884.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON, *Clerk,*
By G. G. GAMMANS,
Deputy Clerk.

111 Supreme Court of the United States.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, LIMITED, Plaintiff in Error,
vs.
ELLIS GIDEON HUGHES, Defendant in Error.

The Dundee Mortgage and Trust Investment Company, Limited' the plaintiff in error, comes now, by its attorney, and, saying that in

the record and proceedings aforesaid there is manifest error, it assigns as error:

1st. The court committed error in undertaking to try without a jury the issues of fact in this cause and in trying the same, because there never was any consent, in writing or otherwise, submitting this cause for trial to the court.

2nd. There was error in this: There never was in this cause any consent, written or filed under the act of March 3rd, 1865, waiving a jury and submitting the cause to the determination of the court.

112 3rd. There was error in this: The local laws of the State of Oregon regulating the submission of causes to referees for trial cannot confer jurisdiction upon the Federal court in the matter of hearing and determining such causes, and there was error in treating the order of reference to the referee for trial as the equivalent of the method prescribed by the acts of Congress as the means of giving the court power to try and determine this cause.

4th. There was error in the act of setting aside the report and findings of the referee, because it nowhere appears that they were not founded upon the testimony and proofs offered by the respective parties, nor does the court so find.

5th. There was error in setting aside and treating as immaterial the 16th finding of fact by the referee, for by the finding of fact by the court and under the opinion accompanying the same this finding was true, in fact; and, if true, there must have been a judgment for the plaintiff in error.

113 6th. There was error in setting this 16th finding of fact by the referee aside unless the same was untrue in fact or was not supported by the proofs, and there was error in holding this finding immaterial.

7th. There was error in the conclusions of law by the court upon the findings of fact found by it in this: The 6th, 7th, 8th, 9th, 10th, 11th, and 12th findings of fact so found by the court show that the whole matter of compensation or remuneration to the defendant in error for his services was fixed and limited to the fees he was allowed to take from borrowers, unless there was some other agreement enlarging the amount thereof, and therefore an assumpsit to pay more than such borrowers' fees or any sum in addition thereto could not arise unless some fact not found by the court should exist, and therefore, upon the findings of fact found by the court and filed along with the opinion herein, the defendant below,

114 plaintiff in error here, was entitled to a judgment in its favor upon the claim for fees other than foreclosure fees.

8th. There was error in allowing the claim for mortgage foreclosure fees because and in this: The agreement was that defendant in error was only to take these fees when the mortgaged premises should be sold for sufficient money to pay the same after paying the loan and interest. The breach of this agreement did not entitle the defendant in error to sue for and have his fees as such unless the conditions agreed upon had actually come, and in this action the

court had no power to apportion an unliquidated demand for such breach of contract, nor to allow partial damages for such breach.

9th. There was error in the conclusions of law by the court and in allowing the judgment in this: The 11th finding of fact by the court, unless the same be inconsistent with the 4th finding, must be interpreted with the latter; so interpreted the two together
115 show that the plaintiff in error had given notice to the defendant in error that he was not to receive or take any compensation from it for general professional services or advice.

10th. The defendant in error being an attorney owing the most perfect good faith to his client, and being specially charged in addition thereto, as found by the 4th finding of fact, to inform the plaintiff in error of any matter of interest to it, and the facts as to his suppression of this claim and generally thereabout, as found in the 11th finding, it *has* error to allow or permit a recovery upon the claim or any portion of it for general services.

11th. Construing the 6th finding with the 11th as found by the court, it conclusively appears that the defendant in error in the matter of the account sued upon acted on the notice contained in the schedule and resolution set out in the 4th finding, and thus the course of dealing between the parties shows the actual under-
116 standing to be as alleged by the plaintiff in error, so that it was error to allow a judgment at all in favor of the defendant in error.

12th. There was error in this: The facts found by the court entitled the plaintiff in error to have a judgment below in its favor—a judgment of dismissal against the claim for fees generally, and for foreclosure fees as well.

And the said Dundee Mortgage and Trust Investment Company, Limited, plaintiff in error, prays the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that it may be restored to all things which it hath lost by occasion of the said judgment.

JAMES K. KELLY,
Att'y for Plaintiff in Error.

Endorsed on cover: Oregon C. C. U. S. No. 94. The Dundee Mortgage and Trust Investment Company (Limited), plaintiff in error, *vs.* Ellis G. Hughes. Filed 13th October, 1884.

Supreme Court of the United States

OCTOBER TERM, 1887,

No. 94.

The Dundee Mortgage and Trust Investment Company, Limited,

Plaintiff in Error,

— *VS.* —

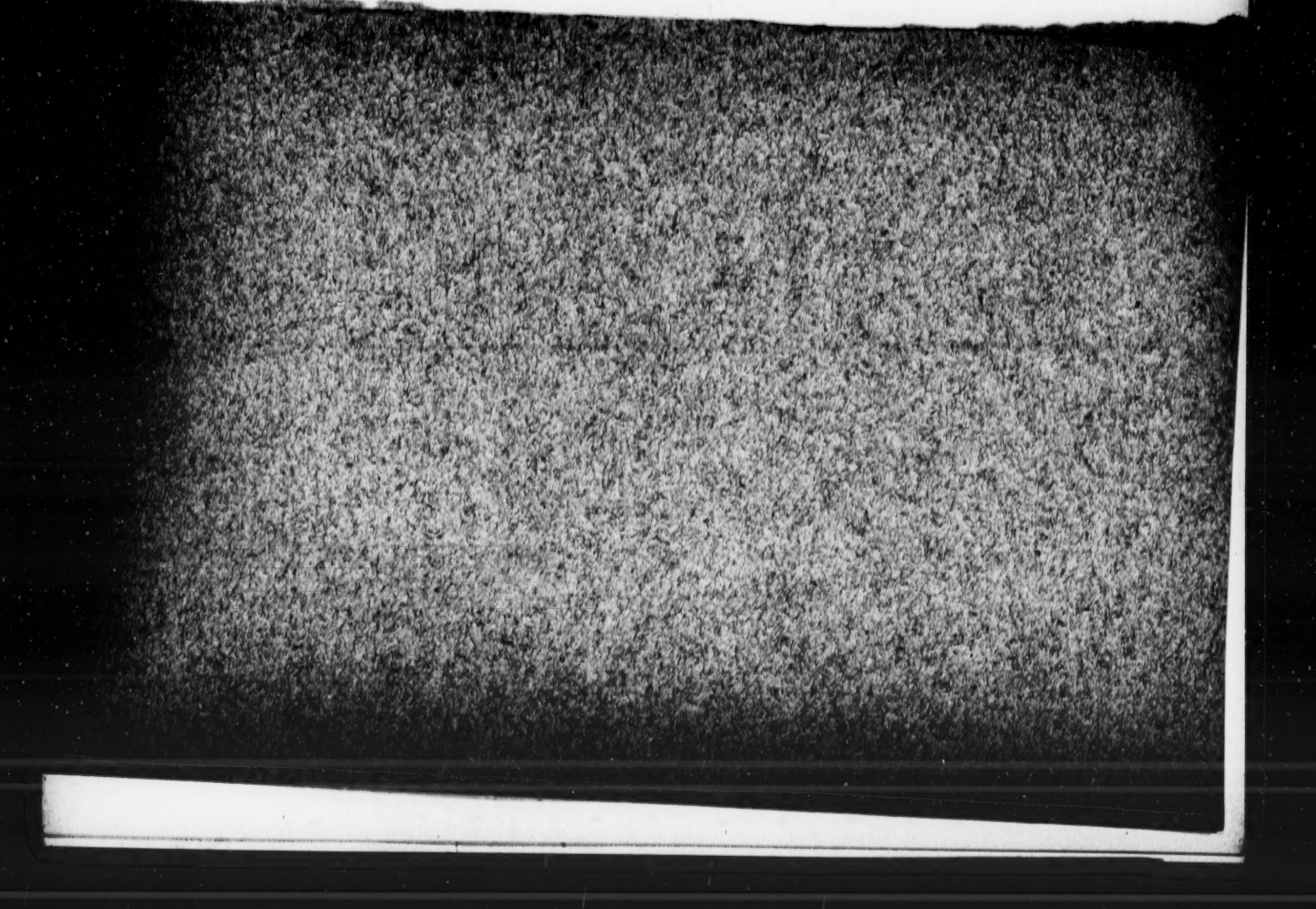
Ellis Gideon Hughes,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS DEWITT CUYLER,
GEORGE F. EDMUNDS,
Of Counsel for Plaintiff in Error.

DONOHO PRINT. & PUB. CO., 24 S. THIRD ST.



In the Supreme Court of the United States.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited, *Plaintiff in Error*,

vs.

ELLIS G. HUGHES.

No. 94.

October Term, 1887.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

Ellis G. Hughes, an attorney-at-law, brought suit February 12th, 1883, in the Circuit Court of the United States for the District of Oregon against The Dundee Mortgage and Trust Investment Company, Limited, plaintiff in error, a foreign corporation, doing business in Oregon, to recover $19,155 for professional services rendered said company and other foreign companies which had amalgamated with it prior to suit brought.

The complaint as amended (see Record, page 21), set forth that the plaintiff was appointed attorney for the Oregon and Washington Mortgage Savings Bank, Limited, of Dundee, Scotland, in 1876, and that the said company was

indebted to him in the sum of $5,000, or $1,000 per annum, for services rendered between July 1st, 1876, and July 17th, 1881; that he was likewise appointed attorney for the Oregon and Washington Trust Investment Company, Limited, of Dundee, Scotland, which was likewise indebted to him for like services rendered between January 1st, 1876, and January 1st, 1880, at $2,500 per annum; that the Oregon and Washington Trust Investment Company amalgamated with the defendant in January, 1880, by virtue whereof its property and assets and liabilities were transferred to defendant; that about June 30th, 1882, the Oregon and Washington Mortgage Savings Bank amalgamated with defendant with like results; that after the amalgamation of the first company, January 1st, 1880, plaintiff rendered defendant services about its business, which were worth $2,500 per annum, but makes no claim for services after July 17th, 1881; and that defendant was also indebted to plaintiff for professional services rendered to said company in certain foreclosure suits which are separate and apart from the other services, and defendant became liable for the same by virtue of the said act of amalgamation.

The defendant, by an answer filed, (see Record, page 24), admits the appointment of plaintiff as attorney of the Oregon and Washington Mortgage Savings Bank, Limited, and Oregon and Washington Trust Investment Company, Limited, and of itself, upon certain terms; denies ~~this~~ its liability to plaintiff in any sum, at any time, or that by virtue of the amalgamation defendant became liable to pay plaintiff any sum upon any account, or that plaintiff rendered any service as its attorney; and averring that during the times plaintiff was attorney for the corporations it was distinctly understood and agreed by and between plaintiff and whichsoever corporation he was then serving, that he was not to charge any fees or compensation against said corporation, but was to look wholly to the borrowers for his remuneration, and that for his fees thus taken, he was to render, without charge,

such general advice as might be desired by either corporation. It denies the claim for foreclosure fees, and that by virtue of said act of amalgamation defendant became liable to plaintiff for any fees in the two said suits.

Plaintiff filed a replication (page 28), denying the averments in the answer.

In compliance with a demand by defendant, plaintiff filed a bill of particulars of his claim, stating that he did not claim anything under special appointment for any special business, but for general services as attorney, and that he kept no items of services, expecting that he would be compensated by a salary which he presumed could be agreed upon.

By consent of the parties the cause was afterwards referred by the court to a referee to take the testimony "pursuant to a stipulation to be filed herein within three months from this date, to try said cause, and to report to the court his conclusions of fact and law thereon." (See Record, page 30).

On May 5th, 1884, the referee filed his report containing his findings of fact and conclusions of law, disallowing the claim for general services, but allowing plaintiff's claim for the foreclosure services in the sum of $755.80. (See Record, page 33).

To this report exceptions were taken on behalf of plaintiff and defendant, which were afterward argued before the court, and, on August 8th, 1884, the court by an order set aside the report, at the same time filing a paper containing its own findings of fact and conclusions of law (page 43), as also an opinion; and judgment was entered against defendant on August 15th, in accordance with this special finding, for the sum of $8,407.61 and costs.

Upon this judgment the defendant brings error.

STATEMENT OF FACTS.

The facts are specially found by the court, and if the learned judge was empowered to make the finding, despite the contention of plaintiff in error to the contrary, the only question in such case is whether the court below was justified in its conclusions of law from the facts so found.

These facts may be summarized as follows:

The terms of Mr. Hughes' appointment by the Trust Investment Company were as follows:

"Attorneyship.—The directors having in view the recommendation of the local board resolved and hereby resolve to appoint Mr. Ellis G. Hughes as the legal agent of the company, this appointment to subsist during the pleasure of the Dundee Board."

"At the same time he was furnished with a written schedule of his duties and responsibilities, as follows:

"(A) To prepare all mortgages, deeds, notes, coupons, and other documents in connection with the company's loans, and to be responsible for their due execution, publication, registration and va idity.

"(B) To be responsible that all mortgages taken are a clear and indisputable first lien upon the subject mortgaged, and to grant certificates to that effect.

"(C) To take charge of and to conduct such proceedings as may from time to time be instituted by the company, or in which the company may be interested, subject to such instructions as may be issued thereanent.

"(D) To advise the local board and the directors of any point of legal or other interest to the company which may be developed or come under his or their notice from time to time by legislative or judicial action or otherwise.

"(E) And generally to give his or their best attention to all matters connected with the legal department of the company's business, and to give such information or advice

as may from time to time be requested or occur to him or them."

The same terms afterward applied to each of the other companies.

His period of services for the Trust Company was from January 1st, 1876, to January 30th, 1880, at which time it amalgamated with plaintiff in error.

He was attorney for the Savings Bank from January 1st, 1876, to July 17th, 1881; but it was not amalgamated with plaintiff in error until June 30th, 1882.

And he was attorney for plaintiff in error from January 30th, 1880, to January 1st, 1882.

The business of these three corporations was that of loaning money on real estate security. The home office of all of them was Dundee, Scotland, an agency only being established in Oregon. Apart from his duties in direct connection with the taking of loans, specified under schedules "A" and "B," and his duties under schedule "C," in foreclosures (afterward provided for), the findings of the court make no mention of what his other services actually were; and while some attempt is made in the opinion to specify some particular acts on his part, the judge himself is forced to confess they amount to very little. And it is difficult to conceive what other duties of any importance a local attorney could as a rule have to perform; for it certainly must be admitted that his principal duties were in connection with the only object of the company's presence in Oregon.

The court finds (fifth finding) that there was no express agreement between the defendant in error and the Trust Investment Company in regard to compensation for the services undertaken and rendered under the appointment and schedule, except that for the services rendered under subdivisions "A' and "B" he was to receive a percentage on the amount loaned; but also (sixth finding) that a question having arisen some time after the appointment as to the division of these fees with the local manager, upon his

remonstrating against it, the company passed the following resolution, and communicated the same to the defendant in error:

"Attorney.—That Mr. Hughes, the company's attorney, be remunerated by fees charged to borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

"This resolution," adds the court, "was received by the defendant in error in due course, and not objected to by him."

It afterward applied to the Bank and Trust Company, and was in force and applicable to the plaintiff in error when he was appointed its attorney.

The "scale of March, 1875," referred to in the resolution, is the same under which the former attorney, Gibbs, acted. It is recited in the fifth finding of the referee (page 34), and also by the court in its opinion, and begins as follows:

"Your professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages shall in no case exceed what the laws of the State warrant and allow, and although the law might allow more, shall never exceed what follows." (Here follows scale of fees, a percentage on each loan).

During the entire time of his employment by each of the corporations in turn, Hughes never made any charge in his books for general services rendered or advice given, and never presented any claim or gave any notice thereof to any of them.

It is needless to add that the method of compensation adopted is the usual one with investment companies, the attorney as a rule never expecting or receiving for all his services more than the fees to borrowers; the position being valuable to him in more ways than from the mere compensation attached to it.

The suit is against The Dundee Mortgage and Trust Investment Company, Limited, alone, and so far as the claim applies to the other companies, it is to enforce the liability arising from its assumption of these debts by virtue of the amalgamation.

By the terms of the mortgages a foreclosure fee was provided for, and subsequently to his appointment as attorney to the Trust Company the defendant in error agreed with them that if they would allow him all the foreclosure of mortgages given under subdivision "C" he would not insist upon immediate payment of the fee where the company was obliged to buy in the property, but wait until the same should be realized out of the property, and until the mortgage debt, interest and costs, should be paid out of the same. The two foreclosure suits mentioned were conducted while said agreement was in force, and this company, having acquired the properties through the amalgamation, though making every endeavor, have never yet been able to sell them.

The following facts are also stated by the referee in his findings and reiterated by the court below in its opinion, but omitted, though certainly not denied, in its findings.

The defendant in error had previous to his appointment been partner with the company's former attorney, and was familiar with the fact that his remuneration for precisely the same services was confined to borrowers' fees, and the company all along understood that the defendant-in-error's appointment was on the same basis, and intended by their resolution so to fix it.

There are some errors in the dates specified by the court in its opinion, which might perhaps justify the belief that the learned judge had not given due weight to whatever considerations and conclusions the sequence of events might give rise; and there are certainly some oversights as to matters of fact, which will be mentioned in the argument.

and which would seem to carry importance as affecting the conclusions of law.

ASSIGNMENTS OF ERROR.

I. The court erred in substituting its own findings of fact for those of the referee, and entering judgment upon its conclusions of law founded thereon.

II. The court erred in its conclusions of law upon its own findings of facts in this that the 4th, 5th, 6th, 7th, 8th, 9th and 11th findings of fact interpreted together show that the compensation of defendant in error was limited to the fees charged to borrowers.

III. The court erred in setting aside the 16th finding of fact of the referee for the avowed reason that conceding it to be true it was nevertheless immaterial, and judgment might be entered notwithstanding.

IV. The court erred in allowing the claim for foreclosure fees.

V. The court erred in the measure of damages it adopted.

VI. The court erred in that its conclusions of law are not supported by its findings of facts.

ARGUMENT.

First Assignment.—"The court erred in substituting its own findings of fact for those of the referee, and entering judgment upon its conclusions of law founded thereon."

It is perfectly evident that the reference provided for by the order of court (see Record, page 30), was not a *trial by the court* under Sec. 649 of the Revised Statutes of the United States.

Nor was it a reference under the Oregon Code, which might perhaps have been adopted under the terms of Sec. 914 of the Revised Statutes, providing, that the forms of procedure in the Circuit Court shall conform as nearly as may be to those of the State Courts. This is evident from the following facts:

1. The order of reference contains no allusion to the Oregon Code.

2. There was no direction that the evidence be filed with the findings of the referee as is provided by the Oregon Code (Sec. 224).

3. No written consent was filed of record, as required by the Code (Title vi., Sec. 218).

The order of court, therefore, can only be construed to provide for a reference at common law under a rule of court, and such was, in point of fact, the intention of the parties.

The modes of reference known to the common law are:

1. A submission without suit.

2. Where the parties have instituted a suit either at law or in equity, they may agree to withdraw the examination of it from the jury or the court, and submit it to arbitrators, making the submission a rule of the court where the cause is depending. The award when made is brought into court, and upon the complaint of either party, if it has been improperly made, the court set it aside.

Kyd on Award, page 346, note.
Moore *vs.* Barnet, 17 Ind., 350.

Where there is a cause depending, a rule of court or judges order, or on the trial an order of *nisi prius* (which two latter are afterwards to be made rules of court) will by common law be drawn up by consent of the parties referring the cause to arbitration.

Russell on Award, 69.

The court in such case by common law still retains a certain jurisdiction over the submission, the proceedings and the award.

Id., 73.

The statutory proceedings do not supersede the common law practice of arbitration, unless expressly so provided, and parties who do not choose to resort to the statutory method may conform to the requisites of the common law practice.

Morse on Arbitration and Award, 43.

Waite's Actions and Defences, 508.

The court in Moore *vs.* Barnet, 17 Ind., 350, a case of a suit pending, and an order of court upon written consent of the parties, says:

"The first point to be determined is upon the character of the proceedings had for the ascertainment of the facts in this cause. Was it an arbitration or a trial by referees? The reference was made by rule of court upon the written consent of the parties. It was made to two persons, these persons met, examined witnesses, etc., and returned the result of their investigations to the court where the cause was pending. All these particulars are common both to an arbitration by reference of a pending cause, and a trial by referees under the code. But the parties on hearing under the reference did not take exceptions and have them made a part of the report to the court as they might have done if the trial was regarded as by referees. The persons

to whom the reference was made were styled arbitrators, and they called their report an award. We incline to think the intention was to have a common law reference to arbitration rather than a trial by referees under the code."

"In cases where a suit is pending, and it is agreed to refer it to arbitration, it may be so referred under a rule of the court. The proceedings under such class of arbitration must be regulated by the terms of the rule of reference, the agreement of the parties, or the common law practice. The three modes are cumulative, and any of them may be adopted; but when adopted it must be pursued unless a deviation be agreed on by the parties."

Francis *vs.* Ames, 14 Ind., 252.

"Had the reference been directed by the court it may be that plaintiff would have been warranted in proceeding to judgment on the report. But in that case defendant would have had a remedy by writ of error."

Dederick's Administrator *vs.* Richley, 19 Wend., 112.

"The power with the consent of the parties to appoint referees and refer to them a pending cause is incident to all judicial administration where the right exists to ascertain the facts as well as to pronounce the law."

Newcomb *vs.* Wood, 7 Otts, 581.

The court will seek to uphold the submission according to the obvious intent.

Morse on Arbitration and Award, 47.

Under a common law reference the court has no power to modify an award, nor to vary the report of the referee. The authority is only to confirm or reject.

Morse on Arbitration and Award, 330.

If the report be set aside the cause remains as if it had never been sent to the referee at all, and stands for trial in the court in which it is pending.

Morse on Arbitration and Award, 338, 617.

Russell on Award, 674.

It is plain, therefore, that the court erred in making new findings of its own after having set aside the findings of the referee, being in no wise authorized so to do either by the terms of the order of reference or the common law practice; and the cause should now stand for trial by jury in the court below just as if a reference had never been made.

Conceding, for the sake of argument, that the court had power under the terms of the order of reference to find its own facts, it is submitted that the conclusions of law set forth are not supported by the findings of fact.

ANALYSIS OF OPINION.

The argument of the court in the opinion giving its reasons for the conclusions it reaches may be briefly summarized as follows:

That no express agreement that the general services should be gratuitous, or in consideration of fees from borrowers, being proved, the mere understanding of the company to that effect does not amount to a contract; nor is it material that defendant in error had reason to believe the

company so understood, so long as he did not cause or authorize such understanding. In such case the law implies a promise to pay. In this case the contract is contained in the document defining defendant-in-error's duties, delivered him on his appointment, which being prepared by the company, any uncertainty must be taken against them.

The resolution, abstracted from its surroundings, would seem to provide that the fees to borrowers should remunerate defendant in error for all services; but the circumstances impose a different construction on the resolution from what its words imply. The circumstances are:

First. That the ordinary meaning of the resolution would make the loans liable to be pronounced usurious.

Second. That the resolution was simply the result of a squabble about dividing these fees with another.

Third. That these fees were not a lucrative compensation for the services, at best.

Having given these reasons in favor of the existence of an implied *assumpsit*, the court then finds nothing in the amount of the borrowers' fees to repel the implication that the other services were to receive additional compensation. Nor does it consider defendant-in-error's long silence with reference to the claim any reason against his maintaining it, especially since plaintiff-in-error's equally long silence while the services were being rendered is equally reprehensible and counterbalances it.

With regard to the value of the services, as defendant in error is unable to give a detailed statement of them, the court considers $2,500 per annum too much, but allows $1,200, adopting an annual sum as a retainer as the only method safely to be followed.

The opinion gives no reasons for the conclusion of the court with regard to mortgage foreclosures, presumably adopting the conclusion of the referee in that respect, without regard to any reasoning for reaching the same.

The plaintiff in error earnestly insists that the reasoning of the learned judge below, which has led him to the conclusions of law set forth, is erroneous in the following particulars:

I. (Under the 2d assignment of error). He has disregarded the full force and effect of the only instruments in writing (to wit, the original instrument of appointment and the resolution) under which the services and compensation were specified, as shown by the 4th, 5th and 6th findings of fact interpreted together; and has likewise disregarded the course of dealings between the parties, as shown by the 7th, 8th, 9th, and 11th findings, which indicates their mutual understanding of the contract.

II. (Under the 3d assignment of error.) He has disregarded the principle of law that if plaintiff in error understood that the borrowers' fees were to be compensation for all the services (except foreclosures), and defendant in error had reason to believe they so understood, his conduct, *under the circumstances*, amounts to an acquiescence which negatives the existence of any implied *assumpsit* for additional compensation.

These circumstances are (A) the length of time during which the services were rendered. (B) the numerous changes in the personnel of his client by reason of the several amalgamations, and the many recurring opportunities, in consequence, for asserting his claim. (C) the fiduciary character of the relation, which obliged him to speak, not only because the terms of his appointment expressly provided that he should do so, but because of the very nature of his appointment as consulting attorney.

III. (Under the 4th assignment of error). The agreement as to foreclosure fees was only to last during the term of the appointment; and in any event the claim could not be upheld in a case where the amount is confessedly not yet due, on the ground that the agreement has been violated as regards other foreclosures.

IV. (Under the 5th assignment). There being admittedly no evidence of the value of the services rendered, the court had no reason for fixing it at the sum named, much less on the basis of a retainer.

The substance of the fourth and fifth findings of the court seems to be that by the terms of the original appointment no compensation was expressly provided for except that the borrowers should pay a certain percentage of the amount of their loans to the attorney for his services in connection with the loans; and that subsequent to the appointment of defendant in error, a difficulty having arisen between him and the company's local agent with regard to the division of these fees, the directors in Scotland passed a resolution and communicated it to defendant in error, who accepted it without comment. This resolution is worded as follows:

"Attorney.—That Mr. Hughes, the company's attorney, be remunerated by fees charged to borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

This resolution, as we have said, was subsequent to the appointment, and this, together with the original instrument of appointment, constitute all of the documents in writing whereby to judge what the services and compensation were.

It cannot be questioned that the resolution is clear and precise in its terms, and constitutes a contract, because

accepted and acted upon by defendant in error. Construed by itself, or with the original instrument of appointment alone, it can only be interpreted in one way, namely, that the compensation for all services was to be by the borrowers' fees, and this is the usual method of compensation in such cases, as is manifest from the admitted fact that Gibbs the former attorney was compensated in this manner. Though actually paid by the borrowers, these fees in reality come out of the pockets of the company, since the rate of interest they are entitled under the law to charge for the loan is diminished by just so much, and the contract is with them, not with the borrower.

Brown *vs.* Genet, 63 How. Pr. (N. Y.), 236.

But the learned judge, though admitting the force of the wording of the resolution, seeks to avoid its effect by explaining that, while abstracted from its surroundings it may indeed be susceptible of such construction (page 55), it would nevertheless, if so construed,

(1.) Make the loans liable to be pronounced usurious.

We have searched the record in vain for any fact that would lead to such a conclusion. Even if such fact existed, a court certainly "cannot construe an illegal contract in a different and legal sense, for this would be to make a contract for the parties which they have not themselves made."

2 Parsons on Contracts, page 636.

But, in point of fact, the record, in express terms, contradicts the learned judge, since the "scale of March, 1875," referred to in the resolution, distinctly provides that "the fees shall in no case exceed what the laws of the State allow." (See Referee's Rep., page 34). The court evidently overlooked the "scale of March, 1875," a thorough

knowledge of which it must be admitted is absolutely essential to the proper interpretation of the instrument.

Where a contract has reference to another paper for its terms, the effect is the same as if the words of the paper referred to were inserted in the contract.

Adams *vs.* Hill, 16 Me., 215.

(2.) But the court says the resolution was the result of a negotiation between defendant in error and plaintiff in error, wherein he claimed that he should not be required to divide his fees with the local manager.

The fact of his desiring to retain all the fees himself should be no reason for narrowing the application of these fees to a certain branch of the services; and, in any event, as the findings of fact detail no circumstances indicating that the negotiation which brought forth the resolution, was confined to the services to borrowers, we are not obliged to consider any such circumstances in this court.

"A mere assertion in the opinion of the court does not amount to a finding, and has no force as such."

Dickinson *vs.* Planter's Bank, 16 Wall., 257.

Besides, there is no such ambiguity here as to justify the admission of parol evidence to explain the intent, for the two writings can be very readily construed together. As against any implied contract in the one we have the express terms in the other.

Van Hagen *vs.* Van Rensselaer, 18 Johns., 42.

But the court adds another reason for construing the resolution differently from its express terms, and that is that the fees paid by borrowers were not a lucrative compensation for the services rendered under schedules "A" and "B" at best (pages 53, 54).

But the fact that the parties had contracted for a less pecuniary remuneration than the services would seem to

demand in the opinion of the court ought not to prevail against the letter of the contract. If a bargain be proved, the attorney cannot recover more by showing that his services were worth more.

Coopwood *vs.* Wallace, 12 Ala., 790.

1 Parsons on Contracts, 116.

And it is plain, too, that the learned judge overestimated the services to borrowers, since he seems to give more weight to the value of the *guarantee*. In the opinion (page 54) he says, "In addition to the ordinary responsibility of an attorney, he absolutely guaranteed that in each case the title was good and the corporation got a first lien." Now in the case of Dundee, etc. Co. *vs.* Hughes, a suit between the self-same parties to test the value of this very guarantee the same judge says, "It is alleged that defendant guaranteed the property was clear of incumbrance. But this is a mere conclusion of law and the facts do not support it. Upon them the transaction is simply an employment to examine and report upon the title. There is no element of guarantee involved. He did not warrant or guarantee the correctness of his work any more than a physician or mechanic does."

Dundee Co. *vs.* Hughes, 10 Sawyer, page 147.

And it may not be out of place in this connection to add that the pecuniary compensation is often the smallest part of the actual remuneration attached to positions of this kind. The borrowers' fees are the only compensation promised by these investment companies to their attorneys, but the position is, notwithstanding, always eagerly sought after, because of its accompanying advantages. The very selection of a man as attorney for a corporation doing a business of half a million a year, (as was the case with the Trust Company alone, page 54,) gives him a standing in the community which is worth a fortune to him, not to speak of the oppor-

tunities constantly falling in his way by reason of the connection. Indeed, the case before us illustrates this point. No sooner was Mr. Hughes appointed, than the company further assisted him by permitting him to insert his name in the mortgages as the attorney in case of foreclosure—of which, however, we will treat further on.

But a more striking illustration is the admission of the defendant in error, himself, as recited by the court in its opinion (page 55). He says he did not bring forward the question of extra compensation "for fear he would have trouble with the corporations about the amount of it at least, and probably lose their business." The business, therefore, is of such value to him that he prefers rather than lose it, to risk the loss of the compensation now asked for, and consequently waits until the business is taken from him, when its loss is not involved in making the claim.

So much, then, for the reasons assigned by the court below why the resolution should be interpreted differently from what its words imply; and if these reasons are either unfounded or do not apply, then we must be permitted to confine ourselves for its true meaning to the four corners of the resolution itself. Here we certainly have no difficulty. For, if the question were solely whether plaintiff should receive all the borrowers' fees as remuneration for certain services only, the resolution would not have been worded "The company trust that these rates of remuneration, which along with the relative appointment are to continue," etc. It would certainly have been worded "shall be remunerated for the services *under schedule 'A' and 'B,'*" or "the rates of remuneration *under schedule 'A' and 'B,'*" Under all rules of English grammar the words "these rates of remuneration" being placed in antithesis to "relative appointment" in the sentence should be construed to cover as large a ground, and include the entire services, just as the relative appointment does. The same ~~meaning~~ applies to the term

Attorney

"the company's attorney," which certainly applies to all the services he was expected to render as such.

The conclusion, therefore, is unanswerable that the learned judge below has failed to give the resolution its full force, and that its only proper construction is that the fees to borrowers were to cover the entire compensation, unless some other fact found by him should produce the opposite conclusion.

Now, what other facts does he find?

I. The court finds that defendant in error never mentioned the matter of compensation for general services other than borrowers' fees to any of the corporations which he served, during the entire term of his service, some six and one-half years, notwithstanding that by the terms of his appointment he was obliged to inform them of any matter of interest to them, and notwithstanding that during such period he had ceased all connection with all of them, in one case for a whole year before the amalgamation took place, whereby he claims plaintiff in error assumed the liability.

II. The court finds that plaintiff in error also was silent regarding it, but impliedly admits, however, (as the referee finds) that the company's "understanding" was that the fees from borrowers covered the entire compensation, and that defendant in error had reason to believe that such was their understanding.

In these facts the court finds reason for supporting the implied *assumpsit*, maintaining that though defendant-in-error's conduct in this respect was wanting in candor it was counterbalanced by that of plaintiff in error in receiving general services without giving notice that it was not going to pay additional compensation for them.

It is perfectly evident that whatever importance is to be attached to the conduct of defendant in error (*i. e.*, his silence under the circumstances) is entirely dependent upon

the interpretation of the terms of the appointment. If the terms of compensation, as the court maintains, only apply to schedule "A" and "B," thereby raising an implied *assumpsit* as to the general services, his silence by itself, so long as it did not cause or authorize any different understanding by the company, does not serve to defeat his claim. But if, as we insist, the *prima-facies* are in favor of the broader application of the borrowers' fees, then his silence is strongly corroborative of such a conclusion, as it serves to show that such was his understanding of the contract.

And we may go one step farther. Even if the application of the borrowers' fees was doubtful, such conduct on his part as would imply the absence of any intention to claim the additional compensation is certainly evidence against the existence of the implied contract, rather than in its favor. If this be so, how much more heavily does his silence weigh against him, where it is his *duty* to speak; and yet, by the terms of his appointment—by the terms of the very schedule of general services for which he institutes this claim—it is provided that "(D) he shall advise the local board and the directors of *any point of legal or other interest* to the company which may be developed or come under his or their notice, from time to time, by legislative or judicial action, or *otherwise*." Now, it surely cannot be said that the existence of this liability of the old companies, which the defendant company was to assume by virtue of the amalgamation, but of which it knew nothing, was not a point of "legal or other interest to the company." Nor can any reasonable being accept his excuse quoted above, that he feared to bring it to the notice of the company "lest he would have trouble with the company about the amount of it at least, and lose their business," as a sufficient reason for not advising the company of this "point of legal interest."

But, apart from the terms of his appointment, he was the company's attorney, owing perfectly good faith to his client,

and obliged from the nature of his relation to advise them of their obligations, nay, even to interpret for their guidance the very terms of his own appointment.

Waite's Actions and Defences, page 465.

Under such circumstances his silence is inexcusable.

Can it be said, then, that this silence is more than counterbalanced by the company's silence? But what of the company's silence? Having carefully drafted the resolution expressing the terms of compensation as plainly as words could make it, what more is there for them to say? With them, the understanding was that the borrowers' fees covered the entire pecuniary compensation (with the exception of the foreclosure fees afterward added). The same terms had existed with the former attorney, with whom the defendant in error was associated as partner during the pendency of such relationship. These facts are found by the referee, and reiterated by the court in its opinion, but do not appear in the findings because the court deems the company's understanding of the terms as to compensation *immaterial*, as not being a mutual understanding (page 52). But herein the learned judge's reasoning seems utterly at fault; for such an understanding, while of course immaterial so far as by itself constituting a contract, nevertheless serves to explain the company's silence, and if it was a reasonable understanding, as it certainly was, it not only excuses the company's silence, but contributes in confirming the broader application of the borrowers' fees, already proved by the terms of the resolution, and corroborated by Hughes' own silence.

We have said that the company's understanding was a reasonable one, and it must not be forgotten in this connection that these were English companies, and by the law of England counsel would have no legal claim for services at all.

Kennedy *vs.* Brown, 13 C. B. N. S., 677.

Moyston *vs.* Moyston, L. R., 5 ch., 457.

It was very natural, therefore, for these English companies not being specially advised thereabout, to give no thought to such a question. We offer this suggestion as a reason sufficient in itself for the existence of the "understanding" on the part of the plaintiff in error, in the absence of any advice on the subject; but it serves as well to direct the court's attention to the prevalence of a like spirit that governs the rulings in this country. Here, the English rule is of course relaxed, but the courts, nevertheless, impressed with the reason for it, are much more cautious in recognizing implied *assumpsits* for services as between lawyer and client than where people are dealing at arms' length: and surely, if any instance exists where such a caution should be observed, it is where, as in this case, the client is a creature of English law, utterly ignorant of the American rule, and relies upon its counsel to give it advice in all respects touching its interests.

"The law regards the client as very much under the influence and control of the attorney and counsel while the professional relation exists between them, and for that reason the conduct and acts of the latter are closely watched and scrutinized."

Goodenough *vs.* Spencer, 46 How. (N. Y.), 351.

"An attorney dealing with his client for further professional services, and the contract is reduced to writing, is bound to show, when he seeks to enforce it, that the latter fully understood the meaning and effect, and that each understood it in the same sense, otherwise it cannot be enforced. * * *

"If a written contract was susceptible of two constructions fairly and reasonably, and the one mind assented to it upon one construction and the other upon the other construction, this would be no contract at all between the parties; and were it a contract between attorney and client it would be the duty of the attorney to inform the client of the fact of

its susceptibility of two constructions, and having pointed out the liability of the contract proceed to know definitely and clearly his client's views before proceeding further."

Plant. r's Bank *vs.* Hornberger, 4 Coldwell (Tenn.), 573.

Tate *vs.* Williamson, Law Rep. 1 Eq., 526.

"The court, from general principles of policy and equity, will always look into the dealings between attorney and client, and guard the latter from *any undue consequences resulting from a situation in which he may be supposed to stand unequal.*"

Starr *vs.* Vanderheyden, 9 Johns., 252.

See Sutherland on Damages, page 448.

Contrast, then, with these principles of law the following words of the learned judge below in his opinion (page 52):

"Nor is it material if the plaintiff, as found by the referee, had reason to believe that the defendant understood that by the contract the plaintiff was to perform these general services without charge, so long at least as he did not by sufficient word or deed, cause or authorize such understanding or conclusion. The *finding is therefore immaterial*, and judgment might be given, notwithstanding it for the value of the services as found by the referee."

The finding here referred to is the sixteenth of the referee, and reads as follows (page 36):

"That during all the time the plaintiff acted in said capacity of legal agent for said corporation, the directors, secretary, and managing agent of said corporation in Oregon understood and supposed that the plaintiff was rendering said services, and the whole thereof in consideration of the fees so to be paid him by borrowers upon loans and the foreclosure fees provided for in case of foreclosure, and that such was their contract with the plaintiff, and their dealings and communications with the plaintiff were sufficient to notify him that they so understood it from the inception of his said employment."

The plaintiff in error contends that in declaring such finding immaterial the court entirely loses sight of the fiduciary character of the relation, as well as the obligation which rested on defendant in error by virtue of the terms of his appointment to notify his client of the claim.

But, if we go one step further, and note the other circumstances accompanying this silence of six and a half years, the conduct of Hughes becomes more and more inconsistent with his plain duty, and incompatible with the existence of any such implied contract. During this interval his connection ceases with all three of the companies in turn, and the two prior corporations, against each of which the claim would attach, at different times amalgamate with the third, and become extinct; and yet, he never utters a word. Further still, he dissolves his connection with one of them —the bank—a whole year before the amalgamation by which its liabilities are resumed by the defendant company. During the whole course of that year he maintains the same silence, notwithstanding, as he himself admits in his bill of particulars, he had not fixed any value on his services, expecting to be paid a gross sum per annum, *to be afterward agreed on*, and this sum had never been agreed on, *though the power of the company to agree at all expired by virtue of the amalgamation.*

This fact also the learned judge overlooked, for he states in the opinion that the amalgamation of the bank with the defendant company took place on the same day that defendant in error dissolved his connection with the bank (page 48).

Can we not therefore infer as a conclusion of law that the conduct of the two parties constitutes such a course of dealing as by itself implies a contract, the terms of which are the services rendered for the compensation received?

Taken, therefore, in connection with the wording of the resolution, the conduct of the parties and circumstances surrounding it would seem to corroborate the plain intent and

fix the compensation provided for as applicable to all the services rendered.

If the language used by the parties is indefinite or ambiguous, the practical interpretation by the parties themselves is entitled to great if not controlling influence.

Chicago *vs.* Sheldon, 9 Wall., 54.

We now come to the foreclosure fees.

The finding with reference to foreclosure suits is (page 46):

"That after the appointment of the plaintiff, and prior to the commencement of the two foreclosure suits in the complaint mentioned, it was agreed between the plaintiff and the last manager of said corporations that the plaintiff would conduct all suits for the foreclosure of mortgages given to either of said corporations under subdivision "C" of said schedule, for the attorney fee provided in said mortgage; and in consideration, that the plaintiff should have the right to conduct all such suits for such compensation, he further agreed with said manager that he would not demand or require the payment of such foreclosure fees in cases when the said corporations were obliged to buy in the mortgaged land for want of bidders, but would wait therefor until the same should be realized by said corporation out of said property, and until the mortgage debt, interest and costs should first be paid out of the same; and said two foreclosures were conducted while said conditional agreement was in force."

"That about January 1st, 1882, the plaintiff ceased to be the legal agent or attorney of the defendant, and immediately thereafter the defendant violated the said agreement and refused to recognize the same, and employed other attorneys than the plaintiff to conduct the foreclosure of mortgages drawn by plaintiff while he was the attorney of such corporation."

With reference to this finding we contend:

1. That even construing the finding most strictly against

the plaintiff in error, and in a manner that its terms will not bear, we have the case of a contract fully carried out as to the matters sued upon, but violated in other respects which do not form the subject of the suit at all. There is no question that the foreclosures here sued upon were given defendant in error by the company in accordance with the agreement, and the properties have not yet been sold; but he asserts that because the company has violated the agreement in other respects, for which he has his remedy when that question is brought up in the proper way, he can recover for these foreclosures notwithstanding.

It is difficult to perceive why these particular foreclosures do not stand by themselves, and the company having admittedly carried out its part of the agreement, why Hughes should be bound by his.

2. But the only proper construction of the finding of the court is, that the agreement was only to last as long as Hughes' appointment, and its violation was justified by the expiration of his term as attorney.

The finding, in substance, is that Hughes would conduct all suits for foreclosure under subdivision "C" for the attorney fee, and in consideration that he should have all such suits for such compensation, he would not require payment, if the properties were bought in, until the company could sell them for sufficient to realize the debt, interest, costs and fees.

Now, what are "all suits for foreclosure given *under subdivision 'C'*"? This subdivision "C" was part of the schedule of his appointment, and that appointment by its express terms was to "subsist during the pleasure of the Dundee Board."

Consequently, if Hughes were given all suits for foreclosures under his appointment, the company, by so doing, fulfilled their part of the contract, and he cannot complain if, after his appointment was at an end, they gave the suits to another attorney.

It would have been unreasonable for the company to have made this agreement to last for all time while, at the same time, providing for Hughes' dismissal at their pleasure; and therefor we take it that the court had good grounds for altering the wording of the referee's finding on this point by omitting his statement that the agreement was to last for all time.

It is, of course, the finding of the court which governs here, and if reasonable and uncontradicted as to its plain terms by other findings, we are entitled to the conclusion of law, its plain wording will warrant.

But the only conclusion of law from such a finding is that the violation of this agreement by the company was justifiable because of its previous dismissal of defendant in error as its attorney, and consequently he has no ground for an action to recover these fees till the company has sold the property, which confessedly by the pleadings and the findings it has not yet done.

The court, therefore, erred, in allowing the defendant in error the foreclosure fees.

There is but one point remaining to be noticed, in which we think the court has erred, and this is the measure of damages it has adopted. In all cases of contract the measure of damages is a question of law.

Sedgwick on Damages, pages 37, 435.

The findings of the court show that defendant in error was attorney for the different corporations at different periods of time, and for different intervals. The pleadings corroborate this, and go a step further by claiming a different amount from each corporation. Thus the complaint (page 21) claims but $1,000 per annum for the services to the bank, and $2,500 per annum for those to the other companies.

The court awards the same sum per annum, explaining

that in order to do so he "must consider these corporations as one continuous client" (page 56).

It is submitted that under the pleadings and in view of the fact that the only liability of the plaintiff in error so far as concerns the services to the old companies is by virtue of the amalgamation, the method of measuring the damages by considering the corporations as one continuous client was erroneous.

As to the value of the compensation:

The court in its opinion says, page 55, "From the evidence it *may be inferred* that plaintiff was freely plied with verbal and perhaps trivial questions by the local manager, but he does not appear to have drafted any agreements or furnished any written opinions. It also appears that he was consulted about some scheme to escape local taxation; that he went before the County Court to get defendant's assessments changed or reduced, and that he attended the biennial session of the legislature when the corporations were threatened with hostile legislation; but no specific *service of even this kind is mentioned or shown.*"

The defendant in error in his bill of particulars acknowledges he kept no items of services, expecting that compensation for the same would be in the nature of a salary. "I presume," said he, "that without much difficulty we could agree on the amount."

In view of these circumstances the court concludes it to be impossible to value the services, and escapes the difficulty by fixing upon a retainer of $1,200 per year.

By "retainer," we mean "the act of a client by which he engages an attorney to undertake a cause:"

Bouvier.

But is it possible for a jury to award a retainer as damages for the breach of an implied contract to pay value?

This would be to fix for the defendant in error the amount of the salary he expected to be paid, but which he acknowledges remained to be agreed upon. It would be, therefore, to add to a contract terms which did not already exist, by defendant-in-error's own admission, and could by no possibility be looked upon in the light of damages on a *quantum meruit* for services rendered where as the court admits "no specific service is mentioned or shown."

In estimating the value of legal services the only principle laid down by the courts is that counsel should be awarded as compensation what his services are reasonably worth.

Van Every *vs.* Adams, 42 Sup. Ct. (J. & S.), 126.

For the method of making such estimate see
People *vs.* Bank, 10 Abb. New Cas., 15.

When there is no express agreement as to compensation, an attorney in order to recover against his client must prove generally what services he has rendered, and what they are reasonably worth.

The question is whether he is entitled to recover anything upon proof merely that he was retained in the suits appealed from without proof of any agreement in regard to compensation or any services in fact rendered.

The party claiming compensation must go further *and show the extent of his performance and its value.*

Stow *vs.* Hamlin, 11 How. Pr., 452.

But if the $1,200 is fixed upon as the value of the *retainer* or mere engagement of defendant in error, aside from the value of any services rendered, in such case the court errs in renewing that retainer every year and apportioning it even to the half of a month, as no reason is shown for the termination of the engagement each year: on the contrary, the court expressly declares that it considers "the three corpo-

rations as constituting one continuous client from January 1st, 1876 to July 17th, 1881," (page 56).

THOMAS DEWITT CUYLER,
GEORGE F. EDMUNDS,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, (LIMITED,) *Plaintiff in Error,*

vs.

ELLIS G. HUGHES, *Defendant in Error.*

No. 94.

Brief for the Defendant in Error.

This cause is brought before this Court by writ of error from the circuit court of the United States for the district of Oregon. It was commenced February 12, 1883, by the defendant in error, against the plaintiff in error, to recover for professional services as attorney and counsellor at law. The issues upon which it was tried were formed by an amended complaint, amended answer, and replication. The plaintiff alleged in his amended complaint, (see Record, pages 21, 22, 23,) in substance, that he was a citizen of the United States residing at Portland, Oregon, and that the defendant was a foreign corporation incorporated under the laws of Great Britain and Ireland, with registered office at Dundee, Scotland, and transacting business in Oregon.

That about August 1, 1876, the Oregon and Washington Mortgage Savings Bank, Limited, of Dundee, Scotland, incorporated under the laws aforesaid, appointed him as its attorney at the city of Portland, Oregon.

That said last-named company became indebted to him in the sum of five thousand dollars on account of services rendered to it, at its request, as its attorney as aforesaid, between July 1, 1876, and July 17, 1881, and for money laid out for said bank at its

request, and that such services were reasonably worth one thousand dollars per annum, or the sum of five thousand dollars in the aggregate.

That the Oregon and Washington Trust Investment Company, Limited, a corporation under the laws aforesaid, duly appointed him its attorney to attend, as such, to its business in the State of Oregon and Washington Territory about January 1, 1876.

That at the request of said company he, as such attorney, rendered services to said company in and about its business, and at the like request expended money for said company, all between January 1, 1876, and January 1, 1880, and that said services, including such expenditures, were reasonably worth $2,500 per year during all of said period.

That about the month of January, 1880, said Oregon and Washington Trust Investment Company, Limited, amalgamated with said defendant, the Dundee Mortgage and Trust Investment Company, Limited, and the former company became merged in the latter company, and the property of the former company became the property of the latter company, and the latter company agreed to pay, and became liable for, the debts of the former company, including the indebtedness of the former company to the plaintiff, and that said sum of $2,500 per year for his said service rendered said former company from January 1, 1876, to January 1, 1880, was due and owing to him from defendant.

That after said amalgamation, at the request of defendant, he rendered services and expended money for it up to January 1, 1882, which services were reasonably worth the sum of $2,500 per year, including expenses incurred by said plaintiff in the rendition of said services.

That about the 30th of June, 1882, the said Oregon and Washington Mortgage Savings Bank, Limited, was merged in the defendant, and all its property became the property of the defendant, and the defendant agreed to pay all the existing liabilities of the said Bank Company, including its indebtedness, to the plaintiff.

That defendant became indebted to the plaintiff in the sum of $224.80 for professional services rendered by him to defendant in foreclosing a mortgage held by said company against Luther

Elkins and others, and by the act of amalgamation said defendant became indebted to the plaintiff in the sum of $531 for professional services rendered by him to said company in the foreclosure case of William Reid, manager, against Joseph W. Hill *et al.*, and that by virtue of the premises said defendant became, and is, indebted to him in the sum of $19,755.

The defendant in its amended answer (see Record, pages 24, 25, 26, and 27) admits that plaintiff was appointed as the resident attorney of said Savings Bank and said Oregon and Washington Trust Investment Company, limited, and admits the amalgamations of said companies, but denies that said companies became indebted to the plaintiff, as alleged, on account of services rendered or otherwise; denies that said services were rendered, and denies that any such services were of the reasonable value alleged, or of any value whatever, and alleges that it was "understood and agreed" between the parties that the plaintiff was not to receive any compensation for his services from any of those corporations, but "was to render without charge such general advice as might be desired by either of said corporations," in consideration of the fees he received from borrowers from said companies; admits plaintiff's services in foreclosing the mortgages, as alleged, and the value of them, but avers that by special agreement they were to be paid for out of the proceeds of the sale of the mortgaged premises after the payment of the debt due to the corporation, and that defendant was obliged to bid in the mortgaged property on the foreclosure sale, and had not been able to sell the same, and, therefore, the fees were not yet due to plaintiff.

Plaintiff in his replication (see Record, pages 28 and 29) denies that it was understood or agreed that he should furnish the general service he did for nothing, or on account of the fees received from borrowers; admits the agreement stated in the answer as to the payment of his fees in the foreclosure cases, but alleges that such agreement was made upon the express agreement that plaintiff was to have the foreclosure of all the defendant's mortgages, which condition the defendant has failed to keep, and denies that the defendant has not been able to sell said mortgaged premises; avers that on July 17, 1881, a change was

made in the mode of compensating the plaintiff, by which the defendant agreed to pay for examining the titles at the rate of $1\frac{3}{8}$ per centum on the amount of all loans, including loans renewed, and to allow him to charge borrowers with expense of travel incurred in such examination, whereby his receipts were materially increased, and in consideration of which he expressly undertook to give the defendant verbal advice about its affairs without further charge; but the defendant soon became dissatisfied with this method of compensation, and the relation terminated about the end of that year.

On the 22d day of October, 1883, by consent of the parties given in open court, the cause was referred to Wm. B. Gilbert, Esq., to take the testimony and report to the Court his conclusions of fact and law therein. (See Record, page 30.)

On January 18th, 1884, on motion of the defendant, the Court made an order extending the time to take testimony sixty days. (See Record, page 52.)

Counsel for both parties appeared before the referee, produced witnesses, submitted testimony, and argued the cause. (See Record, page 30.) On the 5th of May, 1884, the referee filed in said Court his report in said cause addressed to the Honorable Judges of said Court, and accompanied by the testimony taken before him. The report contained his findings of fact, numbered from one to twenty-five, and his conclusions of law. (See Record, pages 33 to 37.)

Two days later, on May 7th, 1884, the defendant, by its attorneys excepted to the 17, 19, 20, and 24 findings of fact, and moved the Court to affirm so much of all said report, including findings and conclusions, as determined that plaintiff recover nothing on account of his three first causes of action, and for judgment thereon, dismissing the complaint as to said causes; *and to set aside the report in so far as it determined that the defendant was indebted to plaintiff in the sum of $755.80 and interest*, and that plaintiff is entitled to judgment therefor, and moved the Court for judgment in its favor. (See Record, page 388.)

And on the 9th of the same month the plaintiff excepted to the 6, 7, 8, 11, 13, 15, 16, 17, 18 findings of fact and to the conclusions of law, and moved for a confirmation of the report wherein it

was not excepted to, *and that so far as excepted to, the same be set aside, and for judgment in accordance with the true facts of the case,* and the law applicable thereto, for the full amount of the plaintiff's claims. (See Record, pages 39 to 42, inclusive.)

On the 7th and 8th of July, 1884, the cause was heard *upon the exceptions of both parties to the report of the referee without objection by either party,* and the Court having heard counsel for both parties, took the same under advisement. (See Record, page 43.)

And on the 8th day of August, 1884, the following findings of the Court were filed in said cause:

In the Circuit Court of the United States for the District of Oregon.

ELIAS G. HUGHES
vs.
THE DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited. } No. 881.

AUGUST 8, 1884.

This cause came on to be heard on the exceptions of the plaintiff and defendant to the findings of the referee, and was argued by Mr. George H. Williams and Mr. Charles B. Bellinger, of counsel for the plaintiff, and Mr. William H. Effinger, of counsel for the defendant; and on consideration thereof, it is ordered that the findings of the referee be, and they are hereby, set aside, and the court now finds and states the conclusions of fact in the case as follows:

(1.) That the Oregon and Washington Trust Investment Company and the Oregon and Washington Mortgage Savings Bank were foreign corporations, having their home offices at Dundee, in Scotland, and were engaged chiefly in the business of loaning money at interest upon real estate security in the State of Oregon and Territory of Washington, having an office and a managing agent at Portland, Oregon, to carry on and conduct their said business, both corporations being essentially under one and the same management in Oregon.

(2.) That said O. & W. T. I. Co. carried on said business in Oregon from about the year 1873 up to January 30th, 1880, when it was amalgamated with the defendant, and said bank carried on its business in Oregon from the time of its amalgation, in ——, 1876, up to June 30th, 1882, when it became amalgamated with the defendant.

(3.) That the defendant is a foreign corporation, having its office at Dundee, in Scotland, and has had in Oregon since the 30th day of January, 1880, a managing agent and an office, and has carried on the business of loaning money in the manner as the two prior corporations aforesaid, and upon said amalgamation the defendant received the assets of said prior corporations and assumed the payment of their debts and liabilities.

(4.) That upon the 17th day of December, 1875, the directors of the said O. & W. T. I. Co., at Dundee, appointed the plaintiff, who was and is an attorney-at-law practicing in Oregon, its legal agent, by resolution in words following:

Attorneyship.—The directors, having in view the recommendation of the local board, resolved and hereby resolve to appoint Mr. Ellis G. Hughes as the legal agent of the company, this appointment to subsist during the pleasure of the Dundee board.

And at the same time furnished the plaintiff a written schedule of his duties and responsibilities as follows:

(A.) To prepare all mortgages, deeds, notes, coupons, and other documents in connection with the company's loans, and to be responsible for their due execution, publication, registration, and validity.

(B.) To be responsible that all mortgages taken are a clear and indisputable first lien upon the subject mortgaged and to grant certificates to that effect.

(C.) To take charge of and to conduct such proceedings as may from time to time be instituted by the company or in which the company may be interested, subject to such instructions as may be issued thereanent.

(D.) To advise the local board and the directors of any point of legal or other interest to the company which may be developed or come under his or their notice from time to time by legislative or judicial action or otherwise.

(E.) And generally to give his or their best attention to all matters connected with the legal department of the company's business, and to give such information or advice as may from time to time be requested or occur to him or them.

(5.) That there never was any express agreement between the plaintiff and the said Oregon and Washington Trust Investment Company in regard to the compensation of the plaintiff for the services undertaken and rendered by him under said appointment and schedule, except that for the services rendered under subdivisions A and B of said schedule he was to receive a percentage on the amount loaned, to be paid by the borrowers.

(6.) That the local manager of said corporation at Portland claimed and received a portion of this percentage from the attorney that immediately preceded the plaintiff in this employment, and claimed and received the same from the plaintiff for some months after his appointment, when he objected to the division of his fees and brought the matter before the corporation, which, on November 23, 1876, passed the following resolution on the subject and communicated the same to the plaintiff:

Attorney.—That Mr. Hughes, the company's attorney, be remunerated by fees charged to borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned.

Which said resolution was received by the plaintiff in due course of mail and not objected to by him.

(7.) That the plaintiff continued in said employment of said corporation up to the time of its amalgamation with the defendant, in January, 1880.

(8.) That the plaintiff became the attorney of said corporation, the O. & W. M. Savings Bank, upon its organization and acted in the same capacity therefor, and rendered thereto similar services to those rendered to said O. & W. T. I Co., and upon the same terms, up to July 17, 1881.

(9.) That from the time of the amalgamation of the O. & W. T. I. Co. with the defendant up to the 17th day of July, 1881, the plaintiff acted as legal agent of the defendant, and performed for it the same services as specified in the schedule aforesaid and upon the same terms.

(10.) That in and by the terms of the mortgages taken by said corporations to secure their said loans provision was made whereby the borrowers agreed to pay a certain percentage upon the amount due, in case of foreclosure suits, as an attorney fee in such case.

(11.) That during the time of his employment by said corporations or since the plaintiff never made any charge upon his books for general services rendered, or advice given them or either of them, and never presented any claim to them or either of them therefor or gave them any notice thereof; nor did said corporations or either of them ever inform the plaintiff that they expected him to give such advice and perform such general service gratuitously or in consideration of being allowed to charge and receive fees from borrowers for services under subdivisions A and B of the schedule aforesaid or otherwise without direct compensation therefor.

(12.) That the compensation received by the plaintiff from borrowers for the services rendered under subdivisions A and B of the schedule aforesaid according to the scale of March, 1875, referred to in the resolution of November 23, 1876, was, on town loans ranging from five hundred to four thousand dollars, from one and one-eighth to two per centum of the amount of the loan, and on country loans from one and one-quarter to two and one-half per centum thereon, and on all loans over four thousand dollars it was the practice to charge not more than one per centum, and that the amount thus received was only a reasonable compensation for such services and the expense attendant thereon.

(13.) That from January 1, 1876, to July 17, 1881, said corporations were under one local management and practically constituted but one client, and were so held and regarded by the plaintiff, and a reasonable retainer or compensation for the services rendered to them by him during such period under subdivisions D and E of the schedule aforesaid is twelve hundred dollars a year.

(14.) That after the appointment of the plaintiff and prior to the commencement of the two foreclosure suits in the complaint mentioned it was agreed between the plaintiff and the last manager of said corporations that the plaintiff would conduct all suits for the foreclosure of mortgages given to either of said corporations under subdivision C of said schedule for the attorney fee provided in said mortgage, and in consideration that the plaintiff should have the right to conduct all such suits for such compensation. He further agreed with said manager that he would not demand or require the payment of such foreclosure fees in cases when the said corporations were obliged to buy in the mortgaged land for want of bidders, but would wait therefor until the same should be realized by said corporation out of said property and until the mortgage debt, interest, and costs should first be paid out of the same, and said two foreclosures were conducted while said conditional agreement was in force.

(15.) That about January 1, 1882, the plaintiff ceased to be the legal agent or attorney of the defendant, and immediately thereafter the defendant violated the said agreement and refused to recognize the same, and

employed other attorneys than the plaintiff to conduct the foreclosure of mortgages drawn by plaintiff while he was the attorney of such corporation.

(16.) That while acting in said capacity of attorney for said O. & W. T. I. Co. the plaintiff conducted the foreclosure suit of said company against Luther Elkins *et al.*, in which suit a decree of foreclosure was taken for the mortgage debt and for two hundred and twenty-four dollars and eighty cents attorney fees on foreclosure, as provided in the mortgage, and thereafter conducted a foreclosure suit against Joseph W. Hill *et al.*, in which a decree was taken for the mortgage debt and for five hundred and thirty-one dollars attorney fee, as provided in the mortgage.

(17.) That in each of said foreclosure suits the mortgaged property was bid in by the plaintiff therein for want of bidders, and that the defendant now owns said property so purchased upon said foreclosure suits, having acquired the same through said amalgamation, and the defendant and its predecessors have used diligent efforts to sell said mortgaged property for sufficient to pay said decrees, but have wholly failed to find purchasers therefor or to realize the said amounts out of the same, and that the plaintiff has never received any fee or compensation for either of—two foreclosure suits.

And as a conclusion of law the court now finds and states as follows:

That the defendant, by reason of the premises, is indebted to the plaintiff for and on account of the services rendered under Subdivisions D and E of said schedule in the sum of six thousand seven hundred and fifty dollars, or at the rate of twelve hundred dollars a year for the period of five years and seven and a half months from January 1, 1876, and in the sum of seven hundred and fifty-six dollars and eighty cents for fees earned in said two foreclosure suits and remaining due and unpaid, and that the plaintiff is entitled to a judgement against the defendant for said sums, with legal interest thereon—nine hundred dollars and eighty-one cents—for one year and six months, or from the commencement of the action, in all, the sum of eight thousand four hundred and seven dollars and sixty-one cents, together with his costs and disbursements.

DEADY, *J.*

See Record, p. 43.

And afterwards, and on the 15th day of August, 1884, judgment was rendered upon the findings of the Court in favor of the plaintiff for the sum of eight thousand four hundred and seven dollars and sixty-one cents damages, and costs and disbursements taxed at three hundred and ninety and $\frac{5}{100}$ dollars. (See Record, p. 56.)

The reference, taking of testimony, report, filing and hearing of the exceptions, and findings of fact and law by the Court were all in strict accordance with the provisions of the Oregon Code of Civil Procedure, and *from the time of the filing of the amended complaint until the rendition of the judgment there was, as appears from the record, neither objections to the proceedings or testi-*

mony, nor exceptions to the rulings or decisions of the Court. On the contrary, the entire proceedings were taken by procurement of the counsel of the parties. Both parties asked the court to set aside the report of the referee. The judgment being adverse to the defendant, it sued out a writ of error, and in this Court *for the first time* objects to the proceedings.

The "Statement of Facts" in the brief of counsel for plaintiff in error appears to be made up, in part, from the findings of the court and of the referee, and in part of statements of counsel. If the court had power to set aside the report of the referee and find the facts, the facts so found by the court, in the absence of a bill of exceptions, are conclusive, and entirely superceded the facts found by the referee. Neither can they be supplemented in this Court, as counsel for plaintiffs in error seem to suppose, by statements concerning the evidence in the opinion of the court.

Dickinson *vs.* The Planters' Bank, 16 Wall., 250.

The following are the assignments of error appearing in the record:

1st. The court committed error in undertaking to try without a jury the issues of fact in this cause and in trying the same, because there never was any consent, in writing or otherwise, submitting this cause for trial to the court.

2d. There was error in this: There never was in this cause any consent, written or filed, under the act of March 3d, 1865, waiving a jury and submitting the cause to the determination of the court.

3d. There was error in this: The local laws of the State of Oregon regulating the submission of causes to referees for trial cannot confer jurisdiction upon the Federal court in the matter of hearing and determining such causes, and there was error in treating the order of reference to the referee for trial as the equivalent of the method prescribed by the acts of Congress as the means of giving the court power to try and determine this cause.

4th. There was error in the act, setting aside the report and findings of the referee, because it nowhere appears that they were not founded upon the testimony and proofs offered by the respective parties, nor does the court so find.

5th. There was error in setting aside and treating as immaterial the 16th finding of fact by the referee, for by the finding of fact by the court and under the opinion accompanying the same this finding was true, in fact; and, if true, there must have been a judgment for the plaintiff in error.

6th. There was error in setting this 16th finding of fact by the referee aside unless the same was untrue in fact or was not supported by the proofs, and there was error in holding this finding immaterial.

7th. There was error in the conclusions of law by the court upon the findings of fact found by it in this: The 6th, 7th, 8th, 9th, 10th, 11th, and 12th findings of fact so found by the court show that the whole matter of compensation or remuneration to the defendant in error for his services was fixed and limited to the fees he was allowed to take from borrowers, unless there was some other agreement enlarging the amount thereof, and therefore an assumpsit to pay more than such borrowers' fees or any sum in addition thereto could not arise unless some fact not found by the court should exist, and, therefore, upon the findings of fact found by the court and filed along with the opinion herein, the defendant below, plaintiff in error here, was entitled to a judgment in its favor upon the claim for fees other than foreclosure fees.

8th. There was error in allowing the claim for mortgage foreclosure fees because and in this: The agreement was that defendant in error was only to take these fees when the mortgaged premises should be sold for sufficient money to pay the same after paying the loan and interest. The breach of this agreement did not entitle the defendant in error to sue for and have his fees as such unless the conditions agreed upon had actually come, and in this action the court had no power to apportion an unliquidated demand for such breach of contract, nor to allow partial damages for such breach,

9th. There was error in the conclusions of law by the court and in allowing the judgment in this: The 11th finding of fact by the court, unless the same be inconsistent with the 4th finding, must be interpreted with the latter; so interpreted the two together show that the plaintiff in error had given notice to the defendant in error that he was not to receive or take any compensation from it for general professional service or advice.

10th. The defendant in error being an attorney owing the most perfect good faith to his client, and being specially charged in addition thereto, as found by the fourth finding of fact, to inform the plaintiff in error of any matter of interest to it, and the facts as to his suppression of this claim and generally thereabout, as found in the 11th finding, it is error to allow or permit a recovery upon the claim or any portion of it for general services

11th. Construing the 6th finding with the 11th as found by the court, it conclusively appears that the defendant in error in the matter of the account sued upon acted on the notice contained in the schedule and resolution set out in the 4th finding, and thus the course of dealing between the parties shows the actual understanding to be as alleged by the plantiff in error, so that it was error to allow a judgment at all in favor of the defendant in error.

12th. There was error in this: The facts found by the court entitled the plaintiff in error to have a judgment below in its favor—a judgment of dismissal against the claim for fees generally, and for forclosure fees as well.

In the brief of counsel the errors assigned are varied somewhat from this formal assignment, and are as follows:

Assignment of Errors.

"I. The court erred in substituting its own findings of fact for those of the referee and entering judgment upon its conclusions of law founded thereon.

"II. The court erred in its conclusions of law upon its own findings of fact in this, that the 4th, 5th, 6th, 7th, 8th, 9th, and 11th findings of fact, interpreted together, show that the compensation of defendant in error was limited to the fees charged to borrowers.

"III. The court erred in setting aside the 16th finding of fact of the referee for the avowed reason that, conceding it to be true, it was nevertheless immaterial and judgment might be entered notwithstanding.

"IV. The Court erred in allowing the claim for foreclosure fees.

"V. The Court erred in the measure of damages it adopted.

"VI. The Court erred in that its conclusions of law are not supported by its findings of fact."

These several assignments of error may, for convenience, be grouped as follows:

I. The *first*, *second*, and *third* assignments of error in the Record and the *first* one in the brief may be considered as one, and, taken together, raise the question whether, by consent of parties, a jury could be waived and the cause tried by a referee and by the court, or by the court alone, in accordance with the provisions of the Oregon Code.

II. The *fourth*, *fifth*, and *sixth* assignment of error in the Record and the *third* error assigned in the brief may be considered together. They are, in substance and effect, that the testimony and proofs did not warrant the Court in setting aside the findings of the referee.

III. The *seventh*, *eighth*, *ninth*, *tenth*, *eleventh*, and *twelfth* assignments of error in the Record, and the *second*, *fourth*, *fifth*, *and sixth* in the brief, may be considered together. They are made

upon the assumption that the findings of the court below are before this Court for consideration, and assign errors in the conclusions of law made by the court from its own findings of fact.

I will consider them in their order, and—

I

There was no error in the reference and trial of the case by the referee and the court without a jury.

The court had power under the established practice of the courts to refer the cause with consent of the parties, and the parties could waive a jury and submit the cause to the court, for the trial of both issue of fact and of law, without a written stipulation, as required by section 649 of the Revised Statutes.

Prior to the passage of the act of March 3, 1865, now section 649 of the Revised Statutes, except in Louisiana, by an act of Congress passed in 1824, and in California and Oregon by an act passed February 19, 1864, there was no law of Congress authorizing the submission of the issues in a common-law action to the court without the intervention of a jury. The 7th section of the said act of February 19, 1864, (13 Stats., 4,) was in effect the same as sections 649 and 700 of the Revised Statutes.

This section was undoubtedly superceded by the general statute of March 3, 1865. A similar statute in force in Louisiana until the passage of the act of March 3, 1865, was held by this Court in *Insurance Co.* vs. *Tweed*, 7 Wall., 44, and in *Flanders* vs. *Tweed*, 9 Wall., 425; to have been superceded by the latter statute. If this is not the case the section of the act of February 19th, 1864, in question was repealed by the Revised Statutes, and counsel for plaintiff in error is correct in assuming that section 649 of the Revised Statutes is in force in Oregon. That section is as follows:

Section 649. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury whenever the parties or their attorneys of records file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.

Section 218 of the Civil Code of Oregon provides that—

Trial by jury may be waived by the several parties to an issue of fact in actions on contract, and with the assent of the court in other actions in the manner following:

* * * * * * * *

3. By oral consent in open court entered in the minutes.

Title VI, of the Civil Code of Oregon provides for trial by referees. Section 221 provides for the reference of all the issue of law and fact in an action with the consent of the parties, and section 222, provides for the like reference in certain enumerated cases when the parties do not consent, upon application of either of the parties or by the court upon its own motion. As no error is assigned as to the reference of the case or the proceeding before the referee, the provisions of the code upon these subjects are not set forth. Section 228 and the first part of section 229 (Hill's Code) provide for the filing of the report, exceptions to the same, and proceedings before the Court, and are as follows:

Sec. 228. The report shall be filed with the clerk. If it be filed in term time either party may, within such time as may be prescribed by the rules of the court or by special order, move to set the same aside or for judgment thereon, or such order or proceeding as the nature of the case may require. If the report be filed in vacation the like proceedings may be had at the next term following.

"*Section* 229. The court may affirm or set aside the report either in whole or in part. If it affirm the report it shall give judgment accordingly. If the report be set aside either in whole or in part the court may make another order of reference as to all or so much of the report as is set aside to the original referees or to others, or it may find the facts and determine the law itself, and give judgment accordingly."

By *Sec. 914*, of the Revised Statutes, the practice pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty causes in the circuit and district courts, are required to conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding in the courts of record of the State within which such courts are held. State laws providing for trial by the court or a referee without the intervention of a jury, on account of the constitutional guarantee of the right of trial by jury, are not adopted by this provision, but by the consent of the parties they may be adopted. And it has been expressly held by this Court in a number of cases that *with the consent of parties the United States courts have power to refer the issues in an action, whether of law or fact.*

In *Newcomb* vs. *Wood*, 97 U. S., 581, it was held by this Court that "the power *with consent of parties* to appoint referees and refer to them a pending cause is incident to all judicial administration where the right exists to ascertain the facts as well as to pronounce the law." This case was brought up by writ of error from the Circuit Court of the United States for the district of Ohio, and it was held that "any issues in an action, whether they be of law or fact, may be so referred under section 281 of the code of Ohio."

Sec. 281 of the Ohio code was as follows:

Section 281. That all, or any of the issues in the action, whether of law or fact, may be referred upon the written consent of the parties or upon their oral consent in court entered in the Journal.

After citing this section the Court said: "The reference here was made in the latter mode and under this authority."

And in *Hicker* vs. *Fowler*, 2 Wall., 123, this Court said:

"Such a reference is in accordance with the established practice of the Federal courts, and is as fully warranted by law as a trial by jury."

When the parties, therefore, waived a jury and consented to this mode of trial, they subjected themselves to the provisions of the Oregon code, which authorizes the court to set aside the findings of the referee and to find the facts and the law without further reference.

Counsel for the plaintiff in error claims that the reference was not a reference under the Oregon code, and that this is evident because—

1. The order of reference contains no allusion to the Oregon code.

This was not necessary the law and the rules of the court determined the mode of proceeding when the reference was made. (See Newcomb *vs.* Wood, 97 U. S., 581.) See order of reference, which contains no reference to Ohio Code. (Record, page 12.)

2. There was no direction that the evidence be filed with the findings of the referee as provided by the Oregon code. (Sec. 224.)

Unfortunately for this claim, the section referred to does not require *that the order of reference shall contain a direction to the referee to file the evidence*, but only that he shall file with his report the evidence taken, which was done in this case.

3. No written consent was filed of record as required by the code. (Title VI, Sec. 218.)

The parties *agreed in open court to file a stipulation.* The fact that they so agreed is an answer to the claim of counsel for plaintiff in error, and the fact that it was not done cannot now be assigned as error.

On the other hand, the following facts show conclusively that the reference was intended to be under the provisions of the Oregon Code:

1. The order is *an order of reference* made by the court *to take the testimony and to report to the court*, and a stipulation was to be filed.

2. The proceedings before the referee and his report, including the filing of testimony, were in accordance with the provisions of the Oregon Code.

3. The plaintiff in error by his counsel, while the case was pending before the referee, applied to the court for and obtained an extension of time to take testimony.

4. The parties excepted to portions of the report under the provisions of section 228 of the Oregon Code, hereinbefore set forth, upon the ground that the facts found were warranted by the testimony.

5. The exceptions were heard without objection before the court in accordance with section 229 of the code.

6. Counsel for plaintiff in error in the 3d assignment of error in the record clearly show that the reference was intended to be under the Oregon Code.

There is absolutely nothing whatever in the case to indicate that the reference was intended by the parties to be an arbitration. It was called a reference, treated by the parties, the referee, and the court as a reference, and the referee called such, and not an arbitrator. There is not shown to have been any rule of court providing for a reference to arbitrators.

In Francis *vs.* Ames, (14 Ind., 352,) cited by counsel, the persons to whom the reference was made were called arbitrators, and their report an award. On the contrary, a reference in Newcomb *vs.* Wood, (97 U. S., 581,) the reference was held to have been under the provisions of the code of Ohio.

But it is not perceived how any error can be assigned here upon the action of the court in setting aside the report of the referee and finding the facts. The parties must be held to have consented to that mode of proceeding. They moved the court to set aside the report; they were present at the hearing; they did not demand further reference or any other mode of trial; they did not object to the court finding the facts, and took no exceptions to the ruling of the court. Under the authorities hereinafter cited upon the subject of waiver of trial by jury, they must be held to have consented to the trial by the court.

It would be fair neither to the court nor the parties to permit the objection to be raised here for the first time.

Bell *vs.* Bruen, 1 How., 169.
Marine Bank *vs.* Fulton Bank, 2 Wall., 252.
Klein *vs.* Russell, 19 *id.*, 433.
Edwards *vs.* Elliott, 21 *id.*, 582.
Walker *vs.* Sauvinett, 92 U. S., 90.
Wheeler *vs.* Sedgewick, 94 U. S., 1.

For this reason, even if the reference were held to be an arbitration, there would be no error in the action of the court apparent in the record.

Counsel cite an authority to show that when a report of arbitrators is set aside the cause stands for trial in the court in which it is pending the same as if it had not been referred.

If it be borne in mind that in this case both parties moved not only to set aside the report, *but for judgment without further reference and without the intervention of a jury, and proceeded to the trial before the court on the evidence taken before the referee, in accordance with the State practice*, it will be seen that the rule by which parties are conclusively presumed to have waived a jury by trial without objection before the court is applicable to this case, whether the officer who took the evidence was a referee or an arbitrator.

But the plaintiff in error insists that there was error in treating the order of reference to the referee for trial as the equivalent of the method prescribed by the act of March 3, 1865. This assumes that the cause could not be submitted to the court for trial of the issues of fact and of law without a written stipulation of

the parties waiving a jury, which is not the case; and that the trial of the cause by the court below, although with the aid of a referee, was substantially a trial by the court, and subject to the sames rules and affected by the same decisions as if there had been no reference of the cause, with which proposition I agree.

The following is a copy of the order of reference:

OCTOBER 22, 1883.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. George H. Williams, of counsel, and the defendant, by Mr. William H. Effinger, of counsel, and by consent of parties it is ordered that this cause be, and the same is hereby, referred to Mr. Wm. B. Gilbert to take the testimony herein, pursuant to a stipulation to be filed herein, within three months from this date, to try said cause, and to report to this court his conclusions of fact and law therein; and said Wm. B. Gilbert is hereby appointed referee for the purpose aforesaid.

I am not informed as to what the nature of the stipulation was to be. I have treated it as a stipulation for a reference of the cause, but if it was to waive a jury and submit the cause to court, the plaintiff in error is placed in the position of, after judgment has been rendered against it, objecting to the jurisdiction of the court to try the cause without a jury without alleging that the defendant is in fault for the stipulation not having been executed. The objection itself is conclusive that no stipulation was made, and that the parties therefore are not entitled to the benefit of said act in this court.

Before the passage of the act of March 3, 1865, it was repeatedly held by this Court that the parties to an action at law pending in the United States courts could waive a trial by jury, and submit the issues of fact and of law to the court, and that the parties would be presumed in this Court to have waived their right to a trial by jury of the issues of fact whenever they were present at the trial in person or by counsel and made no demand for a jury. And since the passage of the act of March 3, 1865, it has been repeatedly held by this Court that parties may still waive a jury, as they could before the act of 1865, without filing a written stipulation, and the same circumstances will amount to a waiver of a jury as before the act was passed.

See *Flanders* vs. *Tweed*, 9 Wall., 425, and cases cited.

Guild et al. vs. *Frontin*, 18 How., 135.
Campbell vs. *Boyreau*, 21 How., 223.
Kearney vs. *Case*, 12 Wall., 275.
Gilman et al. vs. Ill. & Miss. Tell. Co., 91 U. S.
Boogher vs. *Insurance Co.*, 103 U. S., 90.
County of Madison vs. *Warren*, 106 U. S., 623.
Board vs. *Dustin*, 112 U. S., 604.

II.

Passing now to the consideration of the *fourth, fifth*, and *sixth* assignments of error in the Record and to the *third* in the brief, which are in substance that the testimony did not warrant the court in setting aside the report and findings of the referee, it is sufficient to state that the Court, having power to set aside the report and findings of the referee, and to make new findings of law and fact, in the absence of a bill of exceptions, the action of the court is conclusively presumed to be correct, and were content by the evidence. Besides, there was no exception taken in the court below to the action of the court.

Exceptions to the ruling of the court upon the referee's findings must be reserved if the ruling is expected to be reviewed.

People *vs.*. Rocky Mountain T. Co., 4 West Coast Rep's, 557 (Col.)

Such is the practice in this Court.

Boogher *vs.* Insurance Co., *supra.*

Neither can the findings of the referee or the opinion of the court be referred to to show that any finding of the court was not in accordance with the testimony or were immaterial. The conclusive presumption is that there was evidence to warrant the court in setting aside the 16th finding by the referee.

III.

The *seventh, eighth, ninth, tenth, eleventh, and twelfth* assignments of error in the record and *second, fourth, fifth, and sixth* in the brief, which proceed upon the assumption that the findings of fact and law by the court can be considered in this court as a part of the record, and question the correctness of such conclusion of law, cannot be considered here. *Such findings can only*

be reviewed in this court when a jury is waived and a cause submitted to the court by written stipulation in pursuance of Sec. 649 of the Revised Statutes.

Revised Statutes, Sec. 700.

French vs. *Edwards*, 21 Wall., 147.

Allen *vs.* St. Louis Bank, 120 U. S., 20.

Boogher *vs.* Insurance Co., *supra.*

And this is equally the case whether the trial below was by the court, a referee, or an arbitrator.

In Guild et al. vs. *Frontin*, 18 How., 135, it was held by this court that—

Where a trial jury is waived in the court below, and there is no special verdict or agreed statement of facts or bill of exceptions on a point of law, this court cannot review the judgment of the court below.

But having jurisdiction of the cause, and there being no error upon the face of the record, the judgement will be affirmed.

In *Campbell et al.* vs. *Boyreau*, (21 How., 223,) Mr. Chief Justice Taney, speaking for the court, said:

The parties agreed to waive a trial of the facts by a jury, and that the facts as well as the law should be decided by the court upon the evidence adduced by the parties.

* * * * * * * *

It has been repeatedly decided by this court, that in the mode of proceeding which the parties have seen proper to adopt, *none of the questions, whether of fact or of law decided by the court below can be re-examined and reversed by this court upon a writ of error.*

* * * * * * * *

The finding of issues in fact by the court upon the evidence is altogether unknown to a common-law court and cannot be recognized as a judicial act. Such questions are exclusively within the province of a jury, and if, by agreement of the parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties.

* * * * *

And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no question, therefore, open to our revision as an appellate tribunal. Consequently as the circuit court had jurisdiction of the

subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right and on that ground only affirmed.

In *Kearney* vs. *Case*, 12 Wall., 276, it was held by this Court, that—

6. Unless it appears that such an agreement was filed, (the agreement required by the act of March 3, 1865, for the submission of an action at law to the court without the intervention of a jury,) the judgment must be affirmed, *unless error appear in other parts of the record than the findings of fact and judgment of the court thereon.*

7. Parties may still waive a jury, as they could before the act of 1865, without filing a written stipulation, but in such a case no error can be considered in the action of the court on such trial; but the judgment will be held valid unless other errors are apparent in the record.

8. Parties will be presumed in this court to have waived their right to a trial by jury of issues of fact whenever it appears that they were present at the trial in person or by counsel and made no demand for a jury.

In *Gilman et al.* vs. *Ill. and Miss. Tell. Co.*, 91 U. S., a case at law, in which there were questions of law and fact to decide, was submitted to the court, but not under the act of March 3, 1865, Mr. Justice Swayne, announcing the opinion of this Court, said:

"The case having been submitted to the Court and argued by the counsel of both parties, the garnishee not asking for a jury, the record in this respect shows no error. It is to be taken that both parties waived a trial by jury and they are bound accordingly.

Phillips *vs.* Preston, 5 How., 278.
Campbell *vs.* Boyreau, 21 How., 224.
Kelsey *vs.* Forsythe *id.*, 86.

The proceeding not having been according to the act of March 3, 1865, this Court has no power to examine any ruling of the Court below excepted to during the progress of the trial.

Campbell *vs.* Boyreau, *supra.*
Guild *et als. vs.* Frontin, 18 *id.*, 135.
Kearney *vs.* Case, 12 Wall., 275.
Dickinson *vs.* The Planters' Bank, 16 *id.*, 250.

(See also Broogher *vs.* Insurance Co., *supra;* County of Madison *vs.* Warren, *supra;* Board *vs.* Dustin, *supra.*)

These cases are conclusive upon the proposition that the findings of the Court are not before this Court for review, and as there is nothing upon which error can be predicated, and the Circuit Court had jurisdiction of the cause, the judgment must be affirmed.

In view of the foregoing authorities it seems to be unnecessary to consider the alleged errors of law assigned upon the facts as found by the court. These alleged errors were covered by the *second, fourth, and fifth* assignments in the brief. The sixth is too general to require consideration. These assignments are in effect that the court erred in finding as a conclusion of law that the defendant was indebted to the plaintiff on account of the general services rendered by him to the defendant and the other corporations mentioned, and in fixing the amount of such indebtedness at twelve hundred dollars per year and in allowing the claim for foreclosure fees.

The counsel for plaintiff in error, present in their brief what is called an ANALYSIS OF OPINION.

The opinion is no part of the record, the findings of fact and law are in no way affected by it, it cannot be considered *at all* to sustain or discredit the findings of fact, and only as an argument to sustain the conclusions of law. Counsel cannot in this way make the opinion of the court perform the office of a bill of exceptions. Dickinson vs. Planters' Bank, *supra*. This court is not concerned about the correctness of the reasons given by the court below for the judgment, but solely, if the findings are held to be before this court for consideration at all, with the question whether the findings of fact are sufficient to sustain the judgement. I shall not therefore follow counsel through what I consider to be an indirect method to sustain their assignments of error, if not an immaterial controversy. It is quite possible that the opinion may be subject to some criticism and counsel may be able to raise an issue in regard to some of the reasoning of the court, while the findings are unassailable. Let us inquire what the findings are upon these questions.

The court found that the plaintiff in the court below was appointed attorney for the defendant corporation, and the other corporations which became merged in it at the time and in the manner alleged in the complaint, and that his duties as prescribed by the directors embraced the general services for the companies declared upon. (See Record, page 20, folio 50, and the 4th, 7th, with 9 findings of fact by the court, pages 44 and 45.)

That the plaintiff continued in the employment of said several companies and performed at their request the services alleged. (See said 7th, 8th, and 9th findings.)

That from January, 1876, to July 17, 1881, said corporations were under one local management, and practically constituted but one client, and were so held and regarded by the plaintiff, *and a reasonable retainer or compensation for the services rendered to them by him during such period, under subdivisions D and E* (referring to the appointment of plaintiff set forth in finding four) *of the schedule aforesaid, is twelve hundred dollars a year.*

13 Finding, Record, page 46.

That there never was any express agreement between the plaintiff and Oregon and Washington Trust Investment Company in regard to the compensation of plaintiff for said services. (See the 5th finding, page 45.) And that the services performed for the other companies were performed "*upon the same terms.*" (See the 8th and 9th findings, page 45.)

From these findings of fact the court found as a conclusion of law that the defendant was indebted to the plaintiff in the sum of twelve hundred dollars per year for the period of five years and seven and a half months, from January, 1876, with interest thereon from the commencement of the action. The conclusion was irresistable from the facts, unless there is something else in the case inconsistent with these findings, and which must control them.

In *Moreland Township* vs. *Davidson Township*, (71 Pa. State Reports, 377,) Chief Justice Thompson, delivering the opinion of the Supreme Court of Pennsylvania, said:

"If one who is no relative and not an object of charity, but able to earn wages, is proved to have been employed in the service of another for a year or any other period of time, the law implies a promise to pay, on the implication of a contract. Certainly the presumption of a contract will stand until rebutted by facts to the contrary."

And in *Prince* vs. *McRae* (84 N. C., 674:)

"Where the plaintiff, a physician, made no charge upon his books for professional services rendered the defendant, who resisted an action to recover their value, upon the ground that they were intended to be, and were, gratuitous, and the jury found that the defendant employed the plaintiff, whose services were rendered without any express agreement to to pay a definite sum," it was "Held that the law implied a promise on the part of the defendant to pay what they were reasonably worth."

(See also *Dougherty* vs. *Whitehead*, 31 Mo., 255; *Chace* vs. *Corcoran*, 106 Mass., 286; *Ames* vs. *Potter*, 7 R. I., 265; *Handy* vs. *Clark*, 4 Houst., (Del.,) 16; *Rider* vs. *Marion India Rubber Co.*, 28 N. Y., 379; *Hay* vs. *Walker*, 65 Mo., 17; *Allen* vs. *Richmond*, 41 Mo., 302; *Darling* vs. *McDonald*, 77 Ill., 520; *Medsker* vs. *Richardson*, 72 Ind., 323; *Lewis* vs. *Allas, &c.*, 61 Mo., 534; *Beal* vs. *Van Bibber*, 19 La. An., 434; ———, 1 La. An., 197; *Martin* vs. *Fox*, 19 Wis., 552.)

As a defense to this cause of action the defendant alleged in its answer—

That during the times alleged plaintiff was by defendant's designation the attorney of the said corporations in their order of being as aforesaid; that it was all the time distinctly understood and agreed by and between plaintiff and whichsoever corporation he was then so serving that he was not to charge and was not to receive any fees or compensation at all from said corporation or company, but that he was to look wholly to the borrowers for his compensation, and that for his fees to be thus taken he was to render without charge such general advice as might be desired by either of said corporations.

The finding of the court was that there was no such agreement, and unless there was the law implies an agreement to pay for the services what they were reasonably worth. But it is now claimed that from the facts found, while there was no express agreement, there was no implied agreement to pay for the services.

This defense is not a very meritorious one at best.

The court finds as fact that neither of said corporations ever informed the plaintiff that they expected him to give such advice and perform such general service gratuitously, or in consideration of being allowed to charge and receive fees from borrowers; that the amount received from borrowers was only a reasonable compensation for services rendered in connection with the loans and expenses attendant thereon. It appears also that there was an agreement between the parties that plaintiff should have the foreclosure of the mortgages taken under his supervision, which the company repudiated, and that for a portion of such time the plaintiff was required to divide even the fees received from borrowers with the local manager of the company at Portland. So that, according to this defence, the defendant was not

only trying to secure the services of its attorney at the expense of the borrowers, but to make an additional profit out of its customers over and above the legal rates of interest charged.

I adopt the following from the opinion of Judge Deady upon the exceptions to the referee's report as a part of my argument:

The defence that it was "agreed" between the parties that the plaintiff should perform the general service in consideration of the fees received from the borrowers for the particular service is not sustained. The burden of proof in this respect is on the defendant and it has utterly failed to prove any such agreement.

But it is also alleged in the answer that it was "understood," and the referee has found that the defendant and the amalgamated companies "understood," during the time these general services were being rendered that they were performed gratuitously or in consideration of the fees paid by borrowers; but the understanding a party may happen to have about any matter does not constitute a contract between him and another to that effect. To amount to a contract—*aggregatio mentium*—the understanding must be "mutual;" but even a "mutual understanding" is not, strictly speaking, a contract, but rather indicates a common knowledge or apprehension of a contract or transaction. However, the term is sometimes used in this sense in a loose way to signify a contract. In Livingstone *vs.* Ackeston, 5 Cow., 53, cited by counsel for the defendant, Sutherland, J., speaking for the Court, says: "No doubt the services of the plaintiff, having been performed for the benefit of the defendant, with his knowledge and approbation, the law will imply a promise to pay for them, unless it appears that they (the plaintiff and defendant) understood that no compensation was to be made."

Upon the findings, then, taken according to their legal effect, these general services were furnished these corporations at their request and for their benefit without any express agreement as to the mode or measure of compensation therefor, and such, in my judgment, is the decided weight of the evidence. In such a case the law, in the interest of justice and right, implies or supplies such a promise or agreement concerning the compensation as fair and honest men ought to have made. 3 Black., 343; 1 Pars. Con., 4; Ogden *vs.* Saunders, 12 Whea., 341.

Whenever one person does any work or service for another with his consent and there is no agreement as to compensation the law implies a contract contemporaneous with the doing of the work or service to pay what the same is reasonably worth, and the burden of proof is upon the party who, admitting the premises, denies the conclusion or undertakes to avoid or prevent this implication by showing that the work or service was performed gratuitously or included in the compensation made for some other service or thing.

As, for instance, that the party for whom the work or service is done declared at the time he would not pay for it. For the law will not imply a promise by a party against his express declaration to the contrary, unless, as may happen, he is under a legal obligation to that effect, paramount to his own will.

And such, and no more, is the doctrine of Whiting vs. Sullivan, 7 Mas. 107, cited by counsel for defendant, in which it was held that the law would not imply a promise by the defendant to pay for the keeping of a horse in the face of his express declaration to the plaintiff, at the time the horse was delived to him, that he would not. The case of Central Bridge Corporation vs. Abbott, 4 Cush., 473, is a good illustration of the exception to this rule, where the legal obligation of the party is paramount to his will. The defendant crossed the plaintiffs' bridge, claiming that he was exempt from the payment of toll and declaring that he would not pay any; but the court, having found that he was not exempt, held the law implied a promise on his part to pay the legal tolls, notwithstanding his declared intention to the contrary.

The care of St. Jude's Church vs. Denberg, 31 Mich., 284, also cited by counsel for defendant, stands upon another well-known exception to the rule. There a vestryman of the plaintiff in error and an active member of the society voluntarily acted as sexton for a time, and the court held that the law did not imply a contract to pay, because the circumstances clearly repelled the idea that the services were rendered or received with the expectation that payment therefor was to be made or claimed.

The contract which the law implies in any case "is co-ordinate and commensurate with duty" and never goes beyond the obligation supposed to be understood and acknowledged by all. (1 Par. Con., 4.)

Ordinarily the law does not imply a contract to pay for services rendered by one member of a family to another—even by an adult child to the parent with whom he lives, or by the officers of charitable or religious societies to the society, because it is not commonly understood or acknowledged that such services, in the absence of express contract to that effect, are either rendered or received with the expectation of payment therefor being either made or claimed. An implied contract grows out of the acts of the parties, and never includes any stipulation or provision but such as ought, under the circumstances, to have been made. (Ogden v. Saunders, *supra*.)

In this case the contract between the partjes is contained in the document defining the plaintiff's duties and delivered to him on his appointment. This instrument was prepared by the corporation, and whatever of omission or uncertainty there is about it must be taken most strongly against the defendant. If it was intended or expected that the general service to the corporation should be compensated for by the fees received from borrowers it was a simple and natural thing to have said so, unless it was apprehended that such an arrangement would make the loans usurious and void; and if it was thought lawful and desirable to exact from the plaintiff the gratuitous performance of these services as a condition or in consideration of giving him the opportunity to earn the fees from borrowers, why was it not mentioned? The instrument is evidently prepared with skill and care, and while it expressly and minutely provides for the attorney's "fees against borrowers," it is silent as to the compensation for the wide field of general service required to be performed by him for the corporation.

But significance is sought to be given to the word "remunerated" in the resolution of November 23, 1876, in this connection, and it is seriously contended that this resolution proves that the contract was that the

"fees charged to borrowers" were to remunerate the plaintiff for his services to the corporation as well as the borrowers. Abstracted from its surroundings and read without reference to the circumstances that led to its adoption, it may be admitted that this resolution is susceptible of this construction, but when it is considered that it would make the loans of the corporation liable to be pronounced usurious it ought not to be adopted, unless for peremptory reasons; but when it is also remembered that this resolution is simply the result of a negotiation or correspondence between the plaintiff and the corporation, in which the former reasonably and justly claimed that he ought not to be required to divide his fees from borrowers with the local manager of the latter, but that he ought to be allowed to retain the whole of them, according to the terms of his appointment, and for the further reason that they were not a lucrative compensation for the services at best, there is no ground whatever for such construction.

I shall not answer the objections of counsel for the plaintiff in eror to the conclusions of law found by the Court in detail. The facts which I have stated above as having been found by the Court were the ultimate facts in the case, facts necessary to sustain the judgment. The Court had *all the testimony before it*, and these findings are presumed to have been warranted by it. The findings upon which counsel lay so much stress are of facts which in themselves are evidence only upon which ultimate facts might be predicated.

It was not incumbent upon the Court to find these facts or all the facts of this character, and it cannot be assumed that they contain all the evidence upon which the ultimate and necessary facts to entitle the plaintiff to recover were based.

Where court tries issues of fact without a jury under a stipulation of the parties its special findings should set forth ultimate facts and not evidence establishing them.

Mining Co. *vs.* Taylor, 100 U. S., 37.

And this rule being a reasonable one must apply to any trial by the court.

As to the fees in the foreclosure cases it is sufficient to say that the services were performed by plaintiff for the defendant. Their value was established by the decrees of foreclosure. The agreement by which plaintiff was to wait for his fees until the lands were sold and the mortgage debt first satisfied was conditional upon plaintiff being allowed to foreclose all mortgages taken under

his supervision, and the contract was violated by the defendant. The facts entitled the plaintiff to immediate compensation for his services.

Counsel for plaintiff in error are not correct in contending that this agreement was only to last as long as Hughes' appointment and that its violation was justified by his discharge. If such were the case there would have been no necessity for the special agreement. The agrement was made after his appointment. By it he was entitled to conduct *all suits* for the foreclosure of mortgages given to said companies. There was a special reason why he should d sire to perform such service, and which constituted an inducement to make the contract. Under schedules A and B he was responsible for the due execution, registration and validity of the mortgages taken under his supervision, and also that they were a clear and first lien upon the mortgaged premises. By the terms of the finding the agreement would extend to all suits while the plaintiff was able and willing to perform the services. It would probably conform to the intentions of the parties if limited to all suits to foreclose mortgages taken under plaintiff's supervision. Nor is the position that each foreclosure suit stood by itself tenable. The inducement to agree to wait for his fees in certain cases until the lands were sold and the mortgage, debt, interest, and costs paid, was that he was to have the foreclosure of other mortgages in which his fees would be realized upon execution sale. When this agreement was violated Hughes had a right to sue for his compensation for services already performed under it.

J. N. DOLPH.

24-101 Rec'd

These papers on motion to reinstate

Supreme Court of the United States.

GEORGE S. FROST, et al.,

vs.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH.

PETITION OF ALBERT M. HENRY.

GEORGE WILLIAM MOORE,
Attorney for Petitioner.
MOORE & MOORE,
Of Counsel.

UNITED STATES OF AMERICA.

THE

Supreme Court of the United States.

GEORGE S. FROST, CHARLES W. NOBLE, CYRUS WOODMAN, CHARLES B. COLTON, LESTER A. ROBERTS AND MARY E. LORD, Plaintiffs in Error,

vs.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Defendants in Error.

To the Supreme Court of the United States:

Your petitioner, Albert M. Henry, of the City of Detroit and State of Michigan, respectfully represents:

1. He is a citizen of the State of Michigan and of the United States.

2. The bill of complaint in this cause was originally filed by the plaintiffs in error against the defendant in error in the Circuit Court for the County of Chippewa, in Chancery, which is one of the Circuit Courts of the State of Michigan, for the purpose of procuring a decree requiring the defendant to convey to the complainants certain lands in said County of Chippewa, particularly described and set forth in said bill of complaint, to which for greater certainty, your petitioner begs leave to refer and to make the same a part of this his petition.

3. Said cause came on to be heard in said Circuit Court for the County of Chippewa, in Chancery, and the Court thereupon filed the following written finding and conclusions of law, to wit:

"In the Circuit Court for the County of Chippewa, in Chancery."

GEORGE S. FROST, CHARLES W. NOBLE, *et al.*,

vs.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH.

Statement of Facts.

About the year 1833, the defendant established a mission at Sault Ste. Marie upon the lands, the title to which is in dispute in this case. It erected buildings upon said lands, cleared it, made improvements and occupied it as an Indian mission until about the year 1848 or 1849. The land was surveyed out by a United States surveyor, the defendant made claim to it, and under the Act of Congress approved September 25th, 1850, entitled, "An act providing for the examination and settlement of claims for lands at the Sault Ste. Marie, in Michigan," and in accordance with instructions from the Commissioners of the General Land Office, it was referred to the Register and Receiver of the Land Office, at Sault Ste. Marie, to examine into this among other claims.

The Register and Receiver gave notice of their meeting, and took proofs in regard to this claim. Their report was made April 4th, 1853, in which they state that "the tract is not and has not been used for mission purposes for the last four or five years, yet no doubt the avails of the tract is and has been expended in purchasing and rebuilding their present location, about 15 miles above the Sault Ste. Marie."

"That the said Society have been in possession of the said tract long anterior to the first day of January, 1849, and were in possession at that time. We, therefore, confirm to James Shaw, in trust for the Missionary Society of the Methodist Episcopal Church, a tract of land according to metes and bounds, courses and distances, etc.," describing the land in question. Shaw was then the agent of the defendant in charge of the mission. On the 3d day of December, 1853, this Shaw made a contract with one Samuel Whitney for the sale of all the interest of the defendant in and to this land. Said contract is as follows:

"SAULT STE. MARIE, December 3, 1853.

"Received from Samuel Whitney on account of purchase money for the property known as the Methodist Mission property, in this town, one hundred dollars, for which property I hereby agree to make to the said Samuel Whitney, or his assigns, a quit claim deed as soon as the same can be procured from the Methodist Mission Board, whose agent I am in the sale of this property, and to whom it now belongs. And it is hereby agreed that the Mission Board shall use all proper exertions to obtain, at the earliest possible date, a patent for the aforesaid property from the United States Government. The number of acres in said property is 640 acres. The consideration for the same is twelve hundred and eighty dollars.

"JAMES SHAW,
Superintendent Lake Superior District."

"WITNESS,
"C. F. LOOMIS."

On the 15th day of February, 1854, said Whitney paid to said Shaw upon said contract the further sum of two hundred and fifty dollars. Upon the execution of said contract the possession of the property was turned over to Whitney. He exercised acts of ownership over the property, leased it, and had agents in Sault Ste. Marie to look after the property for him. He frequently applied to the defendant to take steps to procure the patent. Shaw informed defendant of his contract

with Whitney, to which it appears some objection was at first made, but on the 15th of December, 1854, Shaw wrote to Whitney that the defendant had given its consent to his agreement, and asked to whom the deed should be made out.

The defendant made out the deed and sent it to Shaw. It is evident that Shaw declined to deliver the deed until the purchase price was paid. The deed was delivered in 1856 to D. Bethune Duffield, of Detroit, and by him him sent to Whitney, for whom Mr. Duffield was then acting as an attorney in that matter. Mr. Shaw was in Detroit at that time. Whitney came to Detroit to meet him. While the testimony is not very satisfactory as to the payment of the balance of the purchase price, yet it is clear that it was the understanding between Shaw and Whitney that the rent received from this property from one Spaulding and Childs was applied in part payment.

Whitney swears positively that the whole purchase price was paid. Shaw, who is now very aged, and whose memory is somewhat defective, says it is his impression that it was paid. The burden of proof as to payment is therefore clearly in favor of the complainants, and I hold as a fact that the purchase price for the land was paid by Whitney.

Subsequent to the contract and the giving of the deed, Whitney applied to the land office at Washington for a patent. He was advised by the Commissioner that further legislation would be necessary to entitle him or the defendant to a patent. Whitney succeeded in procuring such legislation. Subsequently the defendant notified the Land Office that it did not desire to obtain the patent upon the terms required, viz: the payment of $1.25 per acre. Subsequently, however, in the year 1879, it did procure such patent, and paid for it at the rate of $1.25 per acre. It took the patent iu its own name, recorded it, and now claims the legal title by virtue of that patent.

The bill is filed to enforce the specific performance of the contract.

Whitney transferred the property by deed to the complainants in this case. The agent for the complainants, on arriving

at the Sault Ste. Marie, found the property in question vacant. He immediately took possession on behalf of the complainants, and had the possession at the time of the commencement of this suit.

The answer admits the making of the contract, the payment of $350.00, denies the payment of the balance, admits the forwarding of the quit-claim deed to Shaw for the purpose of enabling him to receive the balance due, but denies the delivery of the deed to Whitney, and denies that Shaw surrendered the possession of the land to Whitney upon the execution of the agreement.

Conclusion of Law.

It is clear from the above facts that the defendant was bound by this contract; that it was its duty to use all efforts within its power to procure the patent for the lands, and that the patent, when so procured, would inure to the benefit of said Whitney or his grantees. It can make no difference whether the defendant had, at the time of the alleged contract, an enforceable interest in the lands or not. It claimed to have. It sold out that claim in good faith, agreeing to use its efforts to perfect the title, and agreeing that should the title be so perfected, it should be for the benefit of Mr. Whitney. The defendant will not be permitted now to assert a title contrary to its agreement. The complainants, therefore, are entitled to a decree as prayed for in their bill, subject, however, to the payment of $800, which the defendant paid for the patent, and interest thereon from the date of the payment by the defendant. Nothing was said in the agreement or as it appears between the parties at the time, about any payment to the United States Government. Probably both parties expected to get the patent without payment. There was no agreement on the part of the defendant to pay out any money for the patent, and it is entitled to be reimbursed for the money so paid by it.

C. B. Grant,
Circuit Judge, 25th Judicial Circuit.

4. A decree was entered in said cause in said Circuit Court on the 6th day of October, 1883, in accordance with the finding as aforesaid.

5. Said missionary society of the Methodist Episcopal Church, the defendant in said Circuit Court and the defendant in error in this Court, appealed from said decree to the Supreme Court of Michigan, and said cause was again heard in said Supreme Court of Michigan upon its merits, and said Supreme Court of Michigan afterwards entered a decree reversing said decree of said Circuit Court and dismissing said bill, in which opinion three of the judges concurred, and from which opinion one of the judges dissented, and the dissenting opinion filed in said cause will be found in 56 Mich. Reports, from page 62 to 94, to which your petitioner refers.

6. From the decree so filed in the Supreme Court of Michigan said complainants below and plaintiffs in error in this Court, brought said cause by writ of error from the Supreme Court of Michigan, to this Court, and said cause was filed and entered in this Court shortly after the decision promulgated by the Supreme Court of Michigan as aforesaid. And no action was taken in this Court and cause in regard to said cause from the time the same was filed and entered in this Court as aforesaid until the 8th day of June, 1887.

7. On April 11th, 1887, your petitioner purchased all the right, title and interest of complainants and plaintiffs in error, Cyrus Woodman, Mary E. Lord, George S. Frost and Charles W. Noble, in and to the lands mentioned in complainant's bill, and on the 11th day of May, 1887, he sold the same to one Samuel D. Cargill. Said conveyance from said complainants and plaintiffs in error to your petitioner, and from your petitioner to said Cargill, were about the 15th day of May, 1885, recorded in the office of the Register of Deeds in and for the County of Chippewa, and state of Michigan, that being the county where said land mentioned and described in the bill of complaint in this cause was located. The interest of said four complainants and plaintiffs in error so purchased by your petitioner as aforesaid, constituted two-thirds of the

interest in said property claimed by all the complainants and plaintiffs in error.

8. On May 16th, 1887, your petitioner purchased all the interest of Charles B. Colton and Lester A. Roberts, the remaining complainants and plaintiffs in error, in and to said land, and received their deed therefor. The deed from said Colton and Roberts was executed to one George M. Cole of New York City, and from said George M. Cole a deed was executed to your petitioner, but both deeds were delivered to your petitioner simultaneously. Said George M. Cole never had any equitable interest in said property, and the conveyance to said Cole and then to your petitioner was made merely as a matter of convenience. The interest so purchased by your petitioner from said Colton & Roberts was all the remaining interest claimed by said complainants and plaintiffs in error, being one undivided one-third of their claim in and to the land mentioned in complainants' bill of complaint. The deeds from said Colton and Roberts to said George M. Cole, and from said George M. Cole to your petitioner, were both recorded in said office of the Register of Deeds for the County of Chippewa, on the 21st day of May, 1887. That your petitioner, since said purchase, has never sold or disposed of the said interest, but is now and has ever since been the owner thereof.

9. Your petitioner purchased said last mentioned interest from said Colton and Roberts upon the express promise and agreement upon the part of said Colton and Roberts by their agent, that said cause should not be discontinued or any further proceedings had therein without the consent of your petitioner, and your petitioner avers that he would not have purchased said interest of said Colton and Roberts without said promise and agreement.

10. Prior to the purchase of said one-third interest from said Colton and Roberts, your petitioner did some negotiating with said Cargill for the sale to him of said interest in case your petitioner should acquire the same, and after making said purchase, said negotiations were continued. Said Cargill, by

his agent, offered your petitioner on the 7th day of May, 1887, the sum of $10,000 for said interest, and on the 1st day of June, 1887, said Cargill offered your petitioner the sum of $12,000 for said interest, and since said cause was dismissed as hereinafter set forth, said Cargill, by his agent, has offered your petitioner $5,000 for his interest.

11. Your petitioner is informed and believes that said Cargill, in the year 1887, and before the 8th day of June last, procured a quit-claim deed from said missionary society of the Methodist Episcopal Church, defendant in error, conveying to said Cargill all the right, title and interest of said defendant in error in and to all the lands mentioned and described in complainants' bill of complaint filed in this cause, and said conveyance was before the 8th day of June, 1887, duly recorded in the office of the Register of Deeds in and for the County of Chippewa.

12. After all of the complainants had sold and conveyed all of their interest in the property mentioned and described in complainants' bill as aforesaid, and all their interest in this suit, and after the defendant in error had sold and conveyed all its interest in the property mentioned and described in the complainants' bill of complaint, and all its interest in this suit, and after all of said conveyances had been placed upon record in the office of the Register of Deeds in and for the County of Chippewa as aforesaid, and when neither the complainants and plaintiffs in error or any of them, nor the defendant in error, had any legal or equitable interest in the property mentioned and described in complainant's bill of complaint in this suit, and when the records of the office of the Register of Deeds in and for the County of Chippewa as aforesaid, show that they had conveyed all of their interest as aforesaid, the said complainants and plaintiffs in error and said defendant in error, did thereafter, on June 8th, 1887, by their attorneys, counselors, and solicitors, without the knowledge or consent of your petitioner, make and file a stipulation in writing in this Court and cause in words and figures as follows, to wit:

"In the Supreme Court of the United States.

No. 367, Oct. Term, 1887.

Cyrus Woodman, George S. Frost, Charles W. Noble, Charles B. Colton, Lester A. Roberts, Mary E. Lord, Plaintiffs in Error,

vs.

The Missionary Society of The Methodist Episcopal Church, Defendant in Error.

It is hereby stipulated and agreed by and between the parties to this cause, by the respective attorneys, that the writ of error and appeal herein be dismissed and the said cause discontinued without costs to either party; that each party pay his own costs in this Court and in the Courts below; that the bond for damages executed by plaintiffs in error and sureties be cancelled and the liability of the obligors discharged.

An order shall be entered with the clerk accordingly.

[Signed], Frank T. Lodge,
Attorney for Plaintiffs in Error.

[Signed], De Forest Paine,
Attorney of Counsel for Plaintiffs in Error.

[Signed], E. L. Fancher,
Attorney for Defendants in Error."

13. Pursuant to said stipulation an order was entered in this Court and cause which by its terms dismissed this cause from this Court, and a remittitur from this Court was filed in the Supreme Court of Michigan, where the order of dismissal was also entered, and the decree of the Supreme Court affirmed.

14. At the time said stipulation was signed by said Frank T. Lodge, and said De Forest Paine, neither of them repre-

sented your petitioner, and if said Lodge and said Paine represented any person or persons in said controversy, they represented said complainants and plaintiffs in error only, who at that time had no interest in said controversy.

15. Immediately after your petitioner discovered the fact of said dismissal, he applied to aaid Colton and Roberts to have said cause re-instated, and said Colton and Roberts, by their agent, informed your petitioner that they would do all they could to reinstate said cause, and expressed a desire that your petitioner indemnify them for any costs they might thereafter incur in said cause, and your petitioner agreed to file a satisfactory bond for that purpose, but said Colton and Roberts thereafter refused to do anything further in the matter and refused to have said stipulation recalled or said order vacated, and said stipulation to dismiss still remains of record in this Court, and said order dismissing said cause, still remains of record.

16. Immediately after receiving notice from said Colton and Roberts that they would do nothing further in said matter, your petitioner proceeded to prepare this petition, and he submits that said stipulation was entered into without authority and are void, and the order entered upon it is void, and that neither said complainants Colton and Roberts, nor their attorneys, counselors or solicitors, had any right to file said stipulation or to dismiss said cause.

17. Your petitioner submits that while said stipulation and order of dismissal are void under the circumstances of this case, yet they are not void upon their face, and are apparently a bar to the complainant's right of action and might be used to wrong and injure your petitioner in the suit he is about to institute for the purpose of reviving said cause and having his rights, acquired under said assignment, adjudicated. Your petitioner is ready and willing to indemnify any of the parties to this suit in any manner, and to any amount that this Court shall direct.

Your petitioner therefore asks:

1. That an order may be entered in this cause setting aside and vacating said order of discontinuance, so that your petitioner may have said cause revived as to himself as the grantee and assignee of said complainants Colton and Roberts.

2. That your petitioner may have such other and further relief as shall be just and equitable.

3. That the parties to this suit and each and all of them may be cited to appear in this Court and cause at a time to be named, and show cause, if any there be, why the prayer of your petitioner should not be granted.

ALBERT M. HENRY.

UNITED STATES OF AMERICA,
STATE, AND EASTERN DISTRICT OF MICHIGAN, } ss.

On the nineteenth day of October, 1887, before me personally came Albert M. Henry, and made oath that he had read the foregoing petition, signed by him, and knows the contents thereof, and that the same is true, except as to matters therein stated to be on his information and belief, and as to those matters he believes it to be true.

[SEAL.] JNO. GRAVES,
U. S. Commissioner Eastern District of Michigan.

UNITED STATES OF AMERICA.

THE

Supreme Court of the United States.

GEORGE S. FROST, CHARLES W. NOBLE, CYRUS WOODMAN, CHARLES B. COLTON, LESTER A. ROBERTS AND MARY E. LORD, Plaintiffs in Error,

vs.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Defendants in Error.

TO FRANK T. LODGE,

Attorney for Plaintiffs in Error.

DE FOREST PAINE,

Attorney of Counsel for Plaintiffs in Error.

E. L. FANCHER,

Attorney for Defendants in Error.

GEORGE S. FROST, CHARLES B. COLTON,
CHARLES W. NOBLE, LESTER A. ROBERTS,
CYRUS WOODMAN, MARY E. LORD,
THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, AND
SAMUEL D. CARGILL.

Take notice. A petition, of which the foregoing is a true copy, was on October 24th, 1887, filed in said Court and cause, and the same was presented to the Court in open Court, and an order was then and there made by said Court in said

cause, that you and each of you do show cause if any there be, why the prayer of said petitioner should not be granted.

You and each of you are therefore hereby notified to be and appear before the Supreme Court of the United States, at the court room in the City of Washington, District of Columbia, on Monday, December 19th, 1887, at the opening of Court on that day, and show cause, if any there be, why the prayer of the petitioner should not be granted.

Yours respectfully,

DETROIT, Oct. 31st, 1887. GEORGE WILLIAM MOORE,

MOORE & MOORE, *Attorney for Petitioner.*

of Counsel.

UNITED STATES OF AMERICA.

THE

Supreme Court of the United States.

GEORGE S. FROST, CHARLES W. NOBLE, CYRUS WOODMAN, CHARLES B. COLTON, LESTER A. ROBERTS AND MARY E. LORD, Plaintiffs in Error,

vs.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Defendants in Error.

UNITED STATES OF AMERICA.
State and _____
District of _____ ss.
County of _____

_____

being duly sworn, deposes and says that on the _____ day of November, 1887, he served a copy of a petition, of which the foregoing is a true copy, and also a notice relating thereto, of which notice the foregoing is a true copy on

_____

_____

named in said notice, by delivering the same to him personally at the City of _____, County of _____ and State of _____

_____

Subscribed and sworn to before me this _____ day of November, 1887.

_____

_____

Supreme Court United States.

Re PETITION

ALBERT M. HENRY.

CYRUS WOODMAN, GEORGE S. FROST, CHARLES W. NOBLE, MARY E. LORD, CHARLES B. COLTON, LESTER A. ROBERTS,

Plaintiffs in Error

vs.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH,

Defendant in Error.

Brief of DeForest Paine for Plaintiffs in Error and Samuel D. Cargill.

IN THE

Supreme Court of the United States.

CYRUS WOODMAN,
GEORGE S. FROST,
CHARLES W. NOBLE,
MARY E. LORD,
CHARLES B. COLTON,
LESTER A. ROBERTS,
PLAINTIFFS IN ERROR,

v.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH,
DEFENDANT IN ERROR.

In re the Petition of Albert M. Henry.

BRIEF OF DEFOREST PAINE IN BEHALF OF THE PLAINTIFFS IN ERROR AND SAMUEL D. CARGILL.

This cause was a writ of error to the supreme court of Michigan to bring up the record in a chancery case, wherein the plaintiffs in error were complainants, upon a bill filed to quiet their title to certain lands. By a stipulation of the attorneys of record filed herein the writ of error was, on

the 8th day of June, 1887, dismissed under Rule 28. October 24, 1887, Albert M. Henry filed a petition alleging the purchase by him while this suit was pending here of the interest of Colton and Roberts, plaintiffs in error, in the lands in controversy; that he bought the same upon the agreement by them by their agent, that this suit should not be discontinued without his consent; that thereafter, without his knowledge, said stipulation was made and filed, the attorneys entering into the same in no way representing him. The prayer is that the order of dismissal be vacated so that "petitioners may have said cause revived as to himself, as the grantee and assignee of Colton and Roberts." An order was entered requiring all the parties to this suit, and Samuel D. Cargill, the purchaser of all the other interests, to show cause December 19, 1887, why the prayer of the petition should not be granted.

The plaintiffs, in error, Frost, Noble, Lord, Woodman, and defendant in error have transferred their interests herein, and the same are now held by Samuel D. Cargill.

The plaintiffs in error having transferred all their interests in the land in controversy in this suit the suit abates.

Wallace *v.* Denning, Walker's Ch'y, Mich., 416.
Webster *v.* Hitchcock, 11 Mich., 56.
Widner *v.* Lane, 14 Mich., 124.
Perkins *v.* Perkins, 16 Mich., 162.
Brewer *v.* Dodge, 28 Mich., 359.

II.

If in the state of this record the court can do what is requested by petitioner it is discretionary.

The court should not vacate the order dismissing the writ of error.

1. The equity of the petition, if any, rests principally in

the allegations of paragraph nine (9) in which it is averred that the interest of Colton and Roberts was bought upon the agreement by their agent, that this cause should not be discontinued without the consent of the petitioner.

Both Colton and Roberts in their affidavits assert that they personally made no such agreement and never authorized any person to make it for them; that they never had an agent in the sale of their interest herein, but conveyed the same by reason of an outstanding option and pursuant to it, which option they had given April 6, 1887, forty days prior to the purchase by Mr. Henry.

The name of the agent with whom this alleged agreement was made is not given, nor is his affidavit filed in support of the petition. Who is he? What reliance, if any, should Mr. Henry have placed upon his word? He does not show that he asked the agent to show his authority, or that the agent showed authority or stated he had authority to make the agreement that this suit should not be dismissed. Mr. Henry did not, moreover, apply to Colton & Roberts to verify the assumed authority to so agree for them.

Mr. Henry knew of the outstanding contract by Colton and Roberts to sell to Samuel Whitney. There is nothing in that to support his averments of an agreement that this suit should not be dismissed, and it was, they swear, on account of that contract with Whitney that they conveyed their interests herein.

Mr. Henry is a lawyer. He had been referred by Colton and Roberts to De Forest Paine as their solicitor who had their interests herein in charge. By his petition it appears he purchased their interests on the 16th of May, 1887. The stipulation to dismiss this writ was not entered into until on or about the 7th of June, 1887. But neither before nor after such purchase did Mr. Henry retain, or offer to retain, the solicitor whom he knew had sole charge of this litiga-

tion, nor did he request him to act for him in protecting his interests. He had no reason, except the alleged agreement, to believe that this suit would not take the usual course of suits settled. Yet he took no pains to keep it alive. If he was relying on the alleged agreement it was very careless. Beside the doubts of its validity which he should have had, the other plaintiffs in error, being the owners of $\frac{2}{3}$ interest in this litigation, were pressing for and directing a dismissal. Did Mr. Henry not consider that, nothwithstanding the alleged agreement, the other joint plaintiffs in error who had not agreed to continue the litigation might take some steps to dispose of this suit?

2. It appears that Mr. Henry purchased the interests of plaintiffs in error, Frost, Noble, Lord, and Woodman, with money furnished him by Jno. G. Stradley, now a joint-owner with Cargill, of all the interests herein, except that of Colton and Roberts; that Henry declined to take any personal responsibility in purchasing these interests; that he agreed with Cargill and Stradley not to buy the Colton and Roberts interest, and that he retains by consent an interest in other property known as the Bendry lot, purchased simultaneously with the same funds, which interest is valued at $12,000. He bought for $7,500.00 the Colton and Roberts interest in this suit, and in the Bendry lot in each $\frac{1}{3}$ (see option).

The pecuniary interest of Mr. Henry in the whole transaction is thus:

$\frac{1}{3}$ interest in Bendry lot, bought with Cargill and Stradley's money, and retained by Mr. Henry by consent, value	$12,000 00
$\frac{1}{3}$ interest in Bendry lot, bought of Colton and Roberts, value	12,000 00
	$24,000 00

Paid cash to Colton and Roberts for ⅓ interest in the land in controversy herein and in Bendry lot	$7,500 00
Net gain	$16,500 00

The above shows that if Mr. Henry got nothing for the Colton and Roberts interest herein he has made a clear profit of $16,500. He now asks Mr. Cargill to pay him other $16,500 for the Colton and Roberts interest in this suit, an interest acquired by him in violation of his agreement with his principals not to buy the same, but to leave them to buy it for themselves.

3. The writ herein was dismissed upon an agreement made between the parties by their attorneys after all, both plaintiffs and defendant, had sold and transferred their interests in this suit. The attorney for the plaintiffs in error was instructed and directed to dispose of this suit by dismissing the writ, and pursuant to such instructions did so.

All the plaintiffs in error stand and abide by such action. None of them ask that the order entered on the stipulation be vacated. We desire an end of this litigation.

4. If the court grant the prayer of the petition it leaves this suit again pending to be decided. To decide it now would be working in dead matter. This court does not notice, in deciding a cause, interests acquired *pendente lite*, and a decision of this cause would be in favor of and against parties not before the court.

The matter seems to resolve itself to this: Mr. Henry, a lawyer, and, therefore, by training, fully alive to all the considerations of prudence in such transactions, especially, entered into this carelessly and negligently, and, as Cargill & Stradley swear, against his agreement with them. He speculated in this interest, probably taking such chances because the property he purchased of Colton and Roberts at

the same time was of more value than he paid for both it and the interest herein. This petition was filed because he could not agree with Cargill upon a price for the said interest in this suit. This court has refused, on motion of an original party to the record, to reinstate and decide a cause that had been dismissed on account of the carelessness of a solicitor. Much less will it reinstate and decide a cause in favor of a stranger to the record who has been negligent.

Mr. Henry's remedy is an action for damages against the agent who assumed to agree for Colton and Roberts that this suit should not be discontinued without Mr. Henry's consent.

DEFOREST PAINE,

Atty. for Plffs. in Error and Samuel D. Cargill.

124-161

IN THE SUPREME COURT OF THE UNITED STATES.

Answer of the Plaintiffs in Error.

CYRUS WOODMAN, GEORGE S. FROST, CHARLES W. NOBLE, MARY E. LORD, CHARLES B. COLTON, LESTER A. ROBERTS, Pl'ffs in Error,

vs.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Def't in Error.

In Re the Petition of ALBERT M. HENRY.

On the petition herein of Albert M. Henry an order was made requiring the plaintiffs in error, the def't in error, and Samuel D. Cargill to show cause December 19th, 1887, why the order dismissing the writ of error herein entered by stipulation should not be vacated. In response thereto the said plaintiffs in error have filed with the Clerk of this Court the affidavits, of which the following are copies:

Affidavit of De Forest Paine, Attorney for Plaintiffs in Error.

THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

CYRUS WOODMAN, GEORGE S. FROST, CHARLES W. NOBLE, MARY E. Lord, Charles B. Colton, and Lester A. Roberts, Plaintiffs in Error,

v.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Def't in Error.

STATE OF MICHIGAN,
Eastern District of Michigan, County of Wayne, } *ss:*

De Forest Paine, being duly sworn, says he resides in Detroit, Michigan, and is the attorney and counsel of the above-named plaintiffs in error; that he filed the bill of complaint in their behalf in the Michigan chancery court, and as solicitor and counsel for the said plaintiffs in error had sole charge of the litigation in that court and in the supreme court of Michigan and in this court; that he knows the plaintiffs in error and Albert M. Henry; that he signed the stipulation to dismiss the writ of error herein upon written instructions from all the said plaintiffs in error, except Mary E. Lord, to discontinue this suit, and upon such instructions he directed Frank T. Lodge, who appeared in this court as attorney for the plaintiffs in error, at the request and for the convenience of deponent only, to sign the same; that before signing said stipulation

and discontinuing this suit deponent was advised by Mary E. Lord that she had sold and transferred her one-sixth interest herein and received the consideration therefor.

April 14, 1887, plaintiff in error, Cyrus Woodman, instructed deponent in writing in the words and figures following, to wit:

"CAMBRIDGE, MASS., *April 14th*, 1887.

"De Forest Paine, Esq., Detroit, Mich.

"DEAR SIR: I have bargained my interest in the missionary reserve to Albert M. Henry and expect to mail deed to-morrow to C. M. Davison, cashier. As soon as you learn from Mr. D. that the purchase-money has baen actually forwarded to me you will, so far as I am concerned, feel yourself authorized to withdraw the suit now pending in the U. S. court touching said property.

"Yours truly,

"(Signed) CYRUS WOODMAN."

By letter, dated April 22, 1887, said Cyrus Woodman advised deponent that the money above referred to had been paid him. Said Cyrus Woodman repeatedly thereafter wrote deponent to dispose of and settle this suit as speedily as possible.

Under date of May 31, 1887, plaintiffs in error, George S. Frost and Charles W. Noble, wrote deponent as follows, to wit:

"DETROIT, *May 31st*, 1887.

"De Forest Paine, Esq.

"DEAR SIR: Please dismiss the suit in the Supreme Court of the United States, Frost and others against The Missionary Society of the Methodist Episcopal Church, on the best terms as to costs, etc., that you can get.

"Yours respectfully,

"(Signed) CHARLES W. NOBLE,
"*One of Compl'ts.*
"GEORGE S. FROST,
"*One of Compl'ts.*"

Deponent was instructed by plaintiffs in error, Charles B. Colton and Lester A. Roberts, to dismiss this suit by writing in the words and figures following, to wit:

"182 WILLIAM ST., N. YORK, *May* 27, '87.

"De Forest Paine, Esq., Detroit, Mich.:

"Having sold our interest in certain property in Chippewa Co., Michigan, known as the missionary reserve, the title to which is in suit, we hereby authorize and direct you to discontinue said suit so far as we are concerned therein and to have the same dismissed.

"(Signed) CHARLES B. COLTON.
"LESTER A. ROBERTS."

Deponent further says he never heard of the alleged agreement not to discontinue this suit until the petition herein was filed; that

said Albert M. Henry did not retain nor offer to retain deponent to represent him in or to protect his interest in this litigation, nor did he request deponent to act for him herein; that said Albert M. Henry knew deponent had sole charge of this litigation; that he had been referred by said Colton & Roberts to deponent as having charge of their interests herein. The stipulation to dismiss was made on or about the 7th day of June, 1887.

DE FOREST PAINE.

Sworn to and subscribed before me this 13th day of December, A. D. 1887.

[Seal Mart. G. Borgman, Notary Public, Wayne Co., Mich.]

MART. G. BORGMAN,
Notary Public, Wayne Co., Mich.

Affidavit of Plaintiff in Error, Charles R. Colton.

THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

CYRUS WOODMAN, GEORGE S. FROST, CHARLES W. NOBLE, MARY E. Lord, Charles B. Colton, and Lester A. Roberts, Plaintiffs in Error,

v.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Defendant in Error.

STATE OF NEW YORK,
Southern District of New York, New York County, } ss:

Charles B. Colton, being duly sworn, deposes and says he resides in the city of Brooklyn, county of Kings, in said State, and is one of the above-named plaintiffs in error; that on the 6th day of April, A. D. 1887, he joined Lester A. Roberts, plaintiff in error, in executing and delivering to Samuel Whitney an option on the interest of deponent and said Roberts in the land in controversy herein and other land in the words and figures following, to wit:

"We, the subscribers, Charles B. Colton and Lester A. Roberts, hereby contract and agree with Samuel Whitney that we will sell to him, at any time within sixty days from the date hereof, all our ½ title and interest in and to certain real estate in Chippewa county, Mich., known as the mission property and the Bendry lot, and give to him or to whomsoever he may name a quitclaim deed of the same on receipt of seventy-five hundred dollars ($7,500) and satisfactory evidence that he has paid any and all amounts for which he may be liable for taxes and assessments on said property and for any and all legal fees and expenses in a suit relative to the title of the mission property.

"New York, April 6, 1887.

"(Signed) CHARLES B. COLTON.
"LESTER A. ROBERTS."

That, pursuant to the said option and contract and by reason and on account thereof and upon receiving the moneys therein specified, deponent with said Roberts executed and delivered a quitclaim deed of the lands described in the said option to George M. Cole, of New York city, who was then entitled to the said deed under said option.

Deponent further says that he and said Roberts never had an agent in disposing of their interest herein, and that they did not sell their interest in said lands to Albert M. Henry, and that deponent has never agreed with any person whatever that said cause should not be discontinued, nor has he authorized any one to make such agreement for him; that upon delivering the said deed and receiving the said moneys aforesaid deponent and said Lester A. Roberts directed their attorney, De Forest Paine, of Detroit, Michigan, to discontinue this suit.

Further deponent saith not.

CHAS. B. COLTON.

Subscribed and sworn to before me this 14 day of December, A. D. 1887.

[Seal William H. Harris, Notary Public, New York County.]

WILLIAM H. HARRIS,
Notary Public, N. Y. Co.

Affidavit of Plaintiff in Error, Lester A. Roberts.

THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

CYRUS WOODMAN, GEORGE S. FROST, CHARLES W. NOBLE, MARY E. Lord, Charles B. Colton, and Lester A. Roberts, Plaintiffs in Error,

v.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Defendant in Error.

STATE OF NEW YORK,
Southern District of New York, New York County, } *ss:*

Lester A. Roberts, being duly sworn, deposes and says he resides in the city of Brooklyn, county of Kings, in said State, and is one of the above-named plaintiffs in error; that on the 6th day of April, A. D. 1887, he joined Charles B. Colton, plaintiff in error, in executing and delivering to Samuel Whitney an option on the interest of deponent and said Colton in the land in controversy herein and other land in the words and figures following, to wit:

"We, the subscribers, Charles B. Colton and Lester A. Roberts, hereby contract and agree with Samuel Whitney that we will sell to him at any time within sixty days from the date hereof all our ½ title and interest in and to certain real estate in Chippewa county, Mich., known as the mission property and the Bendry lot, and give

to him or to whomsoever he may name a quitclaim deed of the same on receipt of seventy-five hundred dollars ($7,500) and satisfactory evidence that he has paid any and all amounts for which we may be liable for taxes and assessments on said property and for any and all legal fees and expenses in a suit relative to the title of the mission property.

"New York, April 6, 1887.

"(Signed) CHARLES B. COLTON,
"LESTER A. ROBERTS."

That, pursuant to the said option and contract and by reason and on account thereof, and upon receiving the moneys therein specified, deponent, with said Colton, executed and delivered a quitclaim deed of the lands described in the said option to George M. Cole, of New York city, who was then entitled to the said deed under said option. Deponent further says that he and said Colton never had an agent in disposing of their interest herein, and that they did not sell their interest in said lands to Albert M. Henry, and that deponent has never agreed with any person whatever that said cause should not be discontinued, nor has he authorized any one to make such agreement for him; that upon delivering the said deed and receiving the said moneys aforesaid deponent and said Charles B. Colton directed their attorney, De Forest Paine, of Detroit, Michigan, to discontinue this suit. Further deponent saith not.

LESTER A. ROBERTS.

Subscribed and sworn to before me this 14th day of December, A. D. 1887.

[Seal William H. Harris, Notary Public, New York County.]

WILLIAM H. HARRIS,
Notary Public, N. Y. Co.

Affidavit of John G. Stradley.

The Supreme Court of the United States.

CYRUS WOODMAN, GEORGE S. FROST, CHARLES W. NOBLE, MARY E. LORD, CHARLES B. COLTON, LESTER A. ROBERTS, Plaintiffs in Error,

v.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Defendant in Error.

STATE OF MICHIGAN,
Eastern District of Michigan, County of Wayne, } ss:

John G. Stradley, being duly sworn, says he resides at Sault de Ste. Marie, Chippewa county, State of Michigan, and is, with Samuel D. Cargill and others, a joint owner of the property purchased of the parties in this cause in the name of the said Samuel D. Cargill; that he knows Albert M. Henry, of Detroit, Michigan; that prior to

acquiring said property deponent, with said Cargill and others, purchased large tracts of land at and near said Sault de Ste. Marie, intending to construct a waterway at said place for the purpose of furnishing water power to manufactories and for other purposes. To successfully carry out the object of such investments it became necessary to acquire the property in this suit and settle the litigation concerning it; that he undertook, with the said Cargill, the purchase of the said property from both of the parties to the said suit, and for that purpose entered into an oral agreement with Albert M. Henry, of Detroit, Michigan, who is an attorney-at-law, whereby said Henry was to negotiate personally with the plaintiffs in error and said Cargill and deponent were to remain silent and not negotiate for said property with them. Said Albert M. Henry declined to assume or incur any personal responsibility in the purchase of the said interests. Pursuant to such agreement deponent deposited of his own money, to the credit of the said Albert M. Henry in the Detroit National Bank of Detroit, Michigan, twenty-five thousand dollars ($25,000), to be used by him, said Henry, toward the purchase of the interests of the plaintiffs in error.

Deponent further says that said Albert M. Henry used said money to buy the interests of the plaintiffs in error, Cyrus Woodman, Mary E. Lord, George S. Frost, and Charles W. Noble, and paid for said interests therewith and transferred the same to said Cargill.

Deponent further says that at or about the time he deposited said moneys as aforesaid he was informed by said Henry that the plaintiffs in error, Charles B. Colton and Lester A. Roberts, had given an option on their interest in the land in controversy in this suit to Samuel Whitney, whereby they agreed to sell the same to said Whitney; thereupon it was understood and agreed by said Henry that deponent and said Cargill should negotiate for said last-named interest themselves personally, and that said Henry should not attempt to purchase the said Colton and Roberts' interest so optioned.

Deponent further says that thereafter, and in violation of such understanding and while deponent and said Cargill were relying upon and fulfilling said agreement, said Albert M. Henry purchased said Colton and Roberts' interest, and then requested and now requests deponent and said Cargill to pay him the sum of sixteen thousand five hundred dollars ($16,500) therefor.

Deponent further says that with the moneys so deposited as above said Albert M. Henry also purchased of said Mary E. Lord, George S. Frost, and Charles W. Noble, at the time of the purchase by him of their interests herein, their interest in other property at said Sault de Ste. Marie, known as the Bendry claim, which said interest was and is of the value of twelve thousand dollars ($12,000), and which interest, by consent, he, said Albert M. Henry, retains as his own.

Further deponent saith not.

JOHN G. STRADLEY.

Sworn to and subscribed before me this first day of December, A. D. 1887.

{Seal Walter S. Harsha, U. S. Commissioner, Eastern District Michigan, Detroit.}

WALTER S. HARSHA,
U. S. Commissioner, Eastern District Michigan.

Affidavit of Samuel D. Cargill.

In the Supreme Court of the United States.

CYRUS WOODMAN, GEORGE S. FROST, CHARLES W. NOBLE, MARY E. Lord, Charles B. Colton, and Lester A. Roberts, Plaintiffs in Error.

v.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Defendant in Error.

STATE OF WISCONSIN,
Western District of Wisconsin, County of La Crosse, } ss:

Samuel D. Cargill, being duly sworn, deposes and says he resides in La Crosse, State of Wisconsin; that he knows Albert M. Henry, of Detroit, Michigan; that the property purchased of the parties to this suit was taken in his name, to be held for himself, John G. Stradley, of Sault de Ste. Marie, Michigan, and others; that said John G. Stradley and himself were actively engaged in acquiring said interests. Deponent says that he had no negotiations with said Albert M. Henry prior to the purchase by said Henry of the Colton and Roberts interests, for the purchase thereof of him in case he should acquire the same, but says that the said Henry purchased the same in violation of his agreement not to purchase it and to leave deponent and said Stradley to buy the same personally; deponent says he knows John G. Stradley deposited to the credit of said Albert M. Henry twenty-five thousand dollars in the Detroit National Bank of Detroit, Michigan, to be used by the said Henry toward the purchase of the interests of the plaintiffs in error in this suit, which money was so used by him; deponent says he personally purchased the interest of the defendant in error herein; and further saith not.

SAMUEL D. CARGILL.

Sworn to and subscribed before me this 3d day of December, A. D. 1887.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

H. J. PECK,
Clerk U. S. Circuit Court, Western Dist. of Wis.